

INQUIRY

INTO THE

DOCTRINE,

&c.

Y U I R Y

INTO THE

D O C T R I N E

A N
I N Q U I R Y
I N T O T H E
D O C T R I N E

LATELY PROPAGATED, CONCERNING
ATTACHMENTS of CONTEMPT,
T H E
ALTERATION of RECORDS,
A N D T H E
COURT of STAR-CHAMBER.
U P O N T H E
PRINCIPLES of LAW, and the CONSTITUTION,
PARTICULARLY AS THEY RELATE TO
PROSECUTIONS for LIBEL S.

With NOTES, REFERENCES, and OBSERVATIONS.

By an ENGLISH CONSTITUTIONAL CROWN LAWYER.

“ The *English* should be for ever grateful to the Memory of their
“ Ancestors, who, after repeated Contests, at last established
“ that noble Principle, of *adhering* strictly to *Law*.”

Hume's Hist. Engl. Vol. V. 4to. P. 281.

L O N D O N,

Printed for J. WILLIAMS, N^o. 38. next the *Mitre Tavern, Fleet-street*.

MDCCLXIX.

19



TO THE TWELVE HUNDRED AND NINETY-TWO FREEHOLDERS,

OF THE LOYAL COUNTY OF MIDDLESEX ;

TO THE TWELVE HUNDRED AND FORTY-SEVEN LIVERYMEN,

OF THE LOYAL CITY OF LONDON ;

WHO POLLED FOR JOHN WILKES, ESQUIRE,

AT THE GENERAL ELECTION IN MARCH 1768.

TO THOSE DEFENDERS AND PRESERVERS OF THE LAWS AND

CONSTITUTION OF THEIR COUNTRY, AND

OF THE RIGHTS AND LIBERTIES OF THEIR FELLOW

SUBJECTS,

WHOSE NAMES ARE INROLLED IN LETTERS OF GOLD,

AS A MEMORIAL TO THE PRESENT AND FUTURE AGES, THAT

WHOEVER IS ABOVE THE LAW, WILL, IN THE END, FIND

THEMSELVES MISTAKEN,

ARE THE FOLLOWING SHEETS INSCRIBED, DEDICATED, AND

ADDRESSED,

By an *English* constitutional Crown Lawyer.

P R E F A C E.

I HOLD every Man a (a) Debtor to his Profession, from the which, as Men of Course do seek to receive Countenance and Profit, so ought they of Duty to endeavour themselves, by Way of Amends, to be an Help and Ornament thereunto. This is performed, in some Degree, by the honest and liberal Practice of a Profession, when Men scorn to take any Course which is corrupt and unworthy thereof, and make a Point of preserving themselves free from the Abuses, wherewith the same Profession is noted to be infected: but much more is this performed, if a Man be able, from having visited the Fountain of the Science itself, to discover, and by the Strength of his Reason from Reading prevent, the Violation of the Laws and Constitution of his Country, especially if such Violation should ever happen to be attempted by Government or Magistracy; such an Undertaking, on such an Occasion, could not fail of adding Grace, Reputation and Dignity to the Profession in general; and to that individual Member of it in particular. I therefore from the Beginning came to the Study of the Laws of this Realm, with a Mind and Desire no less, if I could attain unto it, that Mankind should be the better by my Industry, than that myself should be the better by the Knowledge of them.

There is no Character in public Life so truly venerable and God-like, as that of a Patriot, the accumulated Praises due to the able and disinterested *Statesman*, the honest *Representative*, the generous *Friend*, the discreet *Guide*, and faithful *Guardian*, are his in the most eminent Degree; with this peculiar Addition, that the Abilities and Integrity of the *Statesman*, the *Representative*, the *Friend*, the *Guide*, and the *Guardian*, are happily centered in an upright Individual, blessed with the Inclination, Means and Opportunity of serving his King, his Country, and all Mankind.

(a) See Lord Bacon, 328. 540.

But

P R E F A C E.

But a patriotic Lawyer is even still more worthy our Attention; his noble Zeal in asserting, his constant Courage and firm Resolution in vindicating, his glorious Intrepidity in preserving the Rights and Liberties of the Subject, the Laws and Constitution of his Country; deservedly claim our warmest and most sincere Acknowledgments.

I profess myself an *English* constitutional Lawyer, and as such could not but be greatly alarmed was I ever to observe the Strength and Power of Government, wisely instituted by Law, for the laudable Purposes of maintaining the Welfare of the Subject, and of supporting the Dignity of the Crown, only employed, much more so, was I to observe them wantonly exerted in the indiscriminate Destruction of the People, not in a Condition, or prepared to defend themselves; and I should, I think, be equally fearful of the Dissolution of Government, was the Administration of public Justice in *England*, suffered to remain with those, whose chief Study and sole Delight had been the *Roman* civil Law; for the Principles naturally resulting from such an Education are incompatible with the Spirit of our Constitution; and although I do not presume myself wise enough to determine which of the two Laws is most perfect, the *Roman* or the *English*; this I know, (which is enough for an *English* Lawyer to know) that notwithstanding almost every Country in *Europe* hath received the former Body of Laws, yet they have been, with a most jealous Constancy, at all Times disclaimed and rejected by *England*.

I publish this Work in the Character of a constitutional Lawyer, and with a professed Design to inquire, whether the Administration of public Justice hath not, within the Space of *fifty* Years last past, been arbitrary and illegal? It is not necessary to mention the particular Place, in which such alarming Proceedings have been had, for whether they were in *Westminster-Hall*, *St. George's Fields*, at the *Old Bailey*, *Guildford*, or even in *America*, they are equally subversive of the Constitution, and equally injurious to the Subject.

The Plan of the following Sheets may be seen by consulting the "Names of the Cases," and the "Contents," prefixed.

Trin. Vac.
8 Geo. 3. 1768.

An English constitutional Crown Lawyer.

ABBREVIATIONS.

ABBREVIATIONS

EXPLAINED.

✦ The Author having adopted some Abbreviations peculiar to himself, in his References to Authorities, troubles the Reader with an Explanation of them; and also a few marginal Notes by Way of Illustration.

A.

- A^D*. *Anc. Dial. Excheq.* *Addison's Works*. 4to. 1761.
Atk. (Bar.) *Sir Robert (a) Atkins's* parliamentary and political Tracts. 8vo. 1741.
Atk. Rep. *Tracy (b) Atkins's Reports in Chancery Temp. Hardwicke C.* 3 Vol. Fol.
 Authentic Memorials by Way of Appendix to the Chevalier *D'Eon's* criminal Prosecution against the Count de *Guerchy*. Printed at *Berlin* in Quarto. 1765.

B.

- Bac. Abr.* *Matthew (c) Bacon's* new Abridgement of the Law. Fol. 1768.

(a) *Sir Robert* was second Judge of the Court of *Common Pleas*, in the Reign of *Charles the Second*. Dugd. Chron. Ser. 118. 2 Jo. 42. and Lord Chief Baron of the Court of *Exchequer*, in the Reign of *James the Second*.

(b) Curfitor Baron of his Majesty's Court of *Exchequer*.

(c) Doctor *Blackstone* gives this Work the Character of a perspicuous and masterly Performance, being supposed to be the MSS of *Sir Geoffry Gilbert*. See 2 *Black. Com.* 322.

A B B R E V I A T I O N S

<i>Bac.</i> (Lord)	Lord (a) <i>Bacon's Works</i> , 4to. 1765.
<i>Bar.</i> Observ.	The Honourable Mr. Justice (b) <i>Barrington's Observations on the Statutes</i> . 4to. 1766.
<i>Barnes.</i>	<i>Henry Barnes's Notes of Cases of Practice in C. B.</i> 8vo.
<i>Black. Com.</i>	Doctor <i>Blackstone's Commentaries on the Laws of England</i> . 4to. 1768.
<i>Bract.</i>	<i>Henrici de Bracton de Legibus & Consuetudinibus Angliæ Libri quinque</i> . Fol. 1569.
<i>Bur. Rep.</i>	<i>Burrow's (c) Reports B. R. Temp. Mansfield C. J.</i> 2 Vol. Fol.
<i>Bunb.</i>	<i>William Bunbury's Reports in the Exchequer</i> .
<i>Burn.</i> Life of <i>Hale</i> .	<i>Bishop Burnet's Life and Death of Sir Matthew Hale</i> , Kt. Lord Ch. Just. B. R. 8vo.
<i>Burn's eccles. Law.</i>	Doctor <i>Burn's ecclesiastical Law</i> . 4to.
	C.
<i>Cap. Shakesp.</i>	<i>William Capel's (d) Works of Shakespeare</i> . 8vo. 1768.
<i>Clar. Hist. Rebel.</i>	Lord Chancellor <i>Clarendon's History of the Rebellion</i> . Fol. 1702.
<i>Clarke's Coins.</i>	<i>Connexion of the Roman, Saxon, and English Coins</i> , deduced from Observations on the <i>Saxon Weights and Money</i> . 4to. 1767.
<i>Co. Lit.</i>	Lord <i>Coke's first Institute</i> , being his Lordship's Commentarie on Judge <i>Littleton's Tenures</i> . Fol. (e) 1629.

(a) The Reference to this Book in the Preface should be to the *second Volume*.

(b) The learned Antiquary *William Clarke* attributes this Book to this Lawyer. See Index to his *Coins*. Tit. *Barrington*.

(c) "These Reports were taken with Care in Court, and afterwards revised with Judgment at Leisure; the Cases are stated fully, the Arguments of the Counsel fairly, the Opinions of the Judges with their Reasons are reported with Perspicuity, and at large; and though they are not ushered into the World with an *Allacatur*, yet they have been cited with the highest Encomium, by one of the present Chiefs, and received with equal Approbation in the first Judicature of these Kingdoms. These are Honors, which no Book, hitherto published in any Science, could ever before attain; though the Author's Diffidence never suffered him to expect such distinguished Marks of public Esteem, his Merit always entitled him to them." Preface to "A Report of the Proceedings in Error, between the Chamberlain of *London*, and the Attornies at Law; touching the Right of the City to oblige those Attornies who practice Conveyancing within the said City to be free of the Scrivener's Company."

(d) This is by far the most correct and judicious Edition of this Author.

(e) This Edition is esteemed the most correct of any, having been revised by the Chief Justice himself. The curious Reader will find many Observations worth his Notice in Mr. *Houard's Translation of Littleton* into modern *French*, in 2 Vol. 4to. 1766.

Com.

E X P L A I N E D.

<i>Com. Dig.</i>	L. C. B. (a) <i>Comyns's Digest of the Laws of England.</i>
<i>Cowel Interpret.</i>	Doctor <i>John Cowel's</i> Law Dictionary, or the Interpreter of Words and Terms, in the common or Statute Law. Fol. 1727.
<i>Crumpt.</i>	<i>Richard Crumpton's</i> Authorité & Jurisdiction des Courts. 4to. 1594.
<i>Cunningb. Rep.</i>	T. (b) <i>Cunningham's</i> Reports. 1766.
D.	
<i>Dig. Lib.</i>	A Digest of the Law concerning (c) Libels. 4to. 1765.
<i>Disc. Treas. & Attaind.</i>	Lord Chancellor (d) <i>West's</i> Discourse concerning Treasons and Bills of Attainder. 8vo.
<i>Dugd. Chron. Ser.</i>	Sir <i>William Dugdale's</i> <i>Chronica Series</i> , at the End of his <i>Origines Juridiciales</i> . Fol. 1680.
F.	
<i>Fortesc. Rep.</i>	Lord <i>Fortescue's</i> Reports. Fol.
<i>Fest. Cr. Law.</i>	Mr. Justice <i>Foster's</i> Reports of crown Cases. Fol.
<i>Ful. Worth.</i>	Doctor <i>Fuller's</i> History of the Worthies of <i>England</i> . 1662.
G.	
<i>Gibf. Camd. Brit.</i>	Bishop <i>Gibson's</i> <i>Camden's Britannia</i> . Fol. 1722.
<i>Gilb. Hist. C. B.</i>	L. C. B. <i>Gilbert's</i> (e) History and Practice of the Court of <i>Common Pleas</i> .
<i>Gr. Spir. Bank.</i>	<i>Green's</i> (f) Spirit of the Bankrupt Laws.

(a) This Digest was lately (5th Feb. 1768.) cited in the Court of *Common Pleas*, when L. C. J. *Wilmot*, and the whole Court were pleased to receive it as Authority, though the Book hath no *Allocatur*, and declared it was a good Book.

(b) This Writer is more laborious than judicious, and more prolix than intelligent.

(c) We candidly acknowledge to have acquired great Knowledge and Improvement in the Perusal of the above elaborate Work, from which we have taken the Liberty to enrich the following Sheets, with many valuable Extracts.

(d) See P. 78.

(e) Doctor *Blackstone* is pleased to say, that "this Book is of a very different Stamp from *Books of Practice* in general; and though (like the rest of his posthumous Works) it has suffered most grossly by ignorant or careless Transcribers, yet it has traced out the Reason of many Parts of our modern Practice, from the feudal Institutions and the primitive Construction of our Courts, in a most clear and ingenious Manner." 3 *Black. Com.* 272. in Notes.

(f) This is deservedly esteemed a most capital Book on the Subject.

A B B R E V I A T I O N S.

H.

- H. H. P. C.* Sir Matthew Hale's *Historia Placitorum Coronæ*. Fol.
- Har. Hist. Ir.* Walter Harris's History and Antiquities of Ireland. Fol. Dublin. 1764.
- Hawk. P. C.* Mr. Serjeant (a) Hawkins's Treatise of the Pleas of the Crown. Fol. 1762.
- Holt's (L. C. J.) Life.* The Life of the Right Honourable Sir John Holt, Knight, Lord Chief Justice of the Court of King's Bench. 8vo. 1764.
- How. Medul.* Doctor Howell's *Medulla Historiæ Anglicanæ*. 8vo. 1750.
- Hume.* David Hume's History of England. 4to. 1762.

J.

- Justin.* Doctor Harris's *Justinian's Institutions*. 4to. 1761.

K.

- 2 (b) Kel.* William Kelyng's Reports in Chanc. B. R. &c. in 4, 5, 6, 7, & 8 Geo. 2. Fol. 1764.

L.

- Lamb. Arch.* Lambard's Archion, or a Commentary upon the high Courts of Justice in England. 8vo. 1635.

(a) This is a good modern Writer on the Crown Law, the best we have except Hale. *Fost. Cr. Law.* 207.

(b) This Collector hath the Honour of being in the Commission of the Peace for the City and Liberty of *Westminster*, and County of *Middlesex*, and as he hath put his Name to the Edition referred to, in order to distinguish it from Lord Chief Justice Keling's Reports published by Lord Chief Justice Holt (see his Lordship's Life, 115.) I cite it. *2 Kel.*

Lettres

E X P L A I N E D.

Lettres, Memoires, & Negociations particulieres du Chevalier D'Eon, Ministre Plénipotentiaire de France, aupres du Roi de la *Grand Bretagne*; avec M. M. les Ducs de *Praslin*, de *Nivernois*, de *Sainte-Foy*, & *Regnier* de *Guerchy*, Ambassadeur extraordinaire, &c. &c. &c. 4to. 1764.

Lil. Pract. Reg.

The Letters, Memoirs, and private Negociations of the Chevalier D'Eon, Minister plenepotentiary of France to the King of *Great Britain*, with the Dukes of *Praslin* and of *Nivernois*, *Sainte-Foy*, and *Regnier* de *Guerchy*, Ambassador extraordinary, &c. &c. &c. 4to. 1764.

John Lilly's practical Register, or a general Abridgment of the Law. Fol. 1735.

M.

Macaul. Hist. Engl.

7 Mod.

8 Mod.

10 Mod.

11 Mod.

12 Mod.

Moseley.

Catharine Macaulay's History of *England*. 4to. 1766.

Thomas Farresley's modern Cases, *Tempore Holt* Ch. Just. B. R. 1757.

Modern Cases in Law and Equity, in 8, 9, 10, 11 & 12 Geo. 2.

Robert Lucas's Cases in Law and Equity, *Tempore Macclesfield* Chanc. & Ch. Just. B. R.

Report of Cases, in 4, 5, 6, 7, & 8 *Queen Anne*; *Tempore Holt* Ch. Just. B. R.

Cases in B. R. *Tempore W.* 3.

William Moseley's Report of Cases in Chancery, *Tempore King* Chanc. *Dublin*. 1744.

O.

Original of the Terms.

In *Sir Henry Spelman's* English and posthumous Works, published by *Bishop Gibson*. Fol. 1727.

P.

Pieces autentiques pour servir ou Process criminel du Chevalier D'Eon contre le Comte de *Guerchy*. A *Berlin*. 1765. 4to.

Authentic Memorials by Way of Appendix to the criminal Prosecution instituted by the Chevalier D'Eon against Count de *Guerchy*. Printed at *Berlin*. 1765. 4to.

R

A B B R E V I A T I O N S

R.

Read. Stat. Law.

Report of the Proceedings in Error, between the Chamberlain of *London*, and the Attornies at Law, touching the Right of the City to oblige those Attornies, who practice Conveyancing within the said City, to be free of the Scrivener's Company.

Rushw. Collect.

Readings upon the Statute Law. 8vo.

A Report (a) of the Proceedings, particularly on the Commission in Error, in the Cause of *Thomas Harrison*, Esquire, Chamberlain of the City of *London*, Plaintiff, against *John Alexander*, Gentleman, an Attorney of the Court of *King's Bench*, Defendant. 4to. 1768.

John Rushworth's historical Collections. Fol. 1680.

S.

Sav.

Les Reports de Sir *John Savile* Chevalier, nadgairis Baron de l'*Exchequer*, de divers special Cafes cybein en le Court de *Common Bank*, come l'*Exchequer*, en le Temps de Royné *Elizabeth*.

In *English*.

The Reports of Sir *John Savile*, Knt. late one of the Barons of the *Exchequer*, of many special Cafes, as well in the Court of *Common Pleas*, as in the *Exchequer*, in the Time of Queen *Elizabeth*.

Seld.

Archdeacon *Wilkins's English* Works of *John Selden*, Esq. Fol. 1726.

Sid. on Gov.

Algernon's *Sidney's* Discourses, concerning Government. Fol. 1751.

Smith Sir. *Tho.*

Sir *Thomas Smith's* Commonwealth of *England*, and Manner of Government thereof. 4to. 1589.

Spelm. Glos.

Henrici *Spelmanni* Glossarium archailogicum. Fol. 1687.

(a) In this Report the Jurisdiction of the superior and inferior Courts, the Privileges of the Attornies at Law therein; and also the History and Validity of Bye-Laws, are learnedly discussed, and fully ascertained by the most eminent Lawyers in *Westminster-Hall*.

St.

E X P L A I N E D.

St. Tri.

A complete Collection of State Trials.
10 Vol. Fol. 1762.

State Law.

State Law : or the Doctrine of Libels
discussed and examined. 8vo.

T.

Tri. at *Ni. Pri.*

An (a) Introduction to the Law, rela-
tive to Trials at *Nisi Prius*. 4to.

V.

Vin. Abr.

Charles (b) Viner's Abridgment of Law
and Equity. 23 Vol. Fol.

When *no* Figure precedes a Book, if the Book consists of more Volumes than one, the Reader is desired to *consider* the *Omission* as a *Reference* to the *first* Volume of the Work.

Quotations not above specified are conceived too obvious to need Explanation, and the References are in general to the common Editions of the Books ; or to Books which never came to a second Impression.

(a) Doctor Blackstone (3 *Black. Com.* 367. Note a) says, " that Lord Chief Baron Gilbert's " excellent Treatise of Evidence hath lately been *engrafted* into this learned and useful Work." I beg Leave to ask the Doctor two Questions, on this very polite and very complimentary Encomium ; for as we know (to use the Words of the facetious Devil upon two Sticks) of what base Metal the Coin [Compliments] is made, we have cried down the Currency.

Suppose I should take the same Liberty of *engrafting* (as you call it) the *whole* of any one of your *Peices* into any Publication of mine, should you not in such Case be of Opinion, *not as a Lawyer*, but as an *Author without any Fee to bias your Judgment*, upon a mere Question of *literary Property*, notwithstanding I was pleased to term it only *engrafting*, that I had really *pirated*, that I had in fact *robbed* you of your Property ?

Was the Author of a Law Book only to insinuate such a Thing as a Writ of *Inquiry in Debt*, should you, Doctor, be of Opinion as a *Lawyer*, whether you had a Fee or not to bias your Judgment, that such *Work* could *legally* be *complimented* with the Epithets *learned* and *useful*, or either and which of them ; without maintaining, at the same Time, that *Ignorance* remained *secure* in the Robes of the *Magistrate* ? For in P. 263. you may read this able, this judicious Passage, said to be wrote by a juridical Pen.

" Note ; In a Writ of Inquiry before the Sheriff, on a Judgment by Default in an Action on " a promisory Note, the Plaintiff must prove his Note the same, as if the Defendant had " pleaded *Non assumpsit* ; *though in Debt on Bond and Judgment by Default it is otherwise.*"

(b) Though this voluminous Writer studied the Law with indefatigable Industry all his Life-Time, yet he informs us himself, that he was by no Means successful in his Practice, for he failed in the two only Law Suits he ever had, in both of which he was Defendant ; you may find an Account of one of them, which was in *Chancery*, in 8 *Vin. Abr.* 198. pl. 39. and of the other, which was at Law, in 1 *Vin. Abr.* 8. 9.

INTRODUCTION.

main I saw 20 million dollars -

1914

the two only lawfully married persons in the world at that time. He was a Jew and she was a Christian. They were married in 1840, and of the other

INTRODUCTION.

INTRODUCTION.

THERE (*a*) is no Virtue so truly great and God-like as *Justice*; most of the other Virtues are the Virtues of created Beings, or accommodated to our Nature as we are Men. *Justice* is that which is practised by God himself, and to be practised in its Perfection by none but him. Omniscience and Omnipotence are requisite for the full Exertion of it. The one to discover every Degree of Uprightness or Iniquity in Thoughts, Words and Actions: the other, to measure out and impart suitable Rewards and Punishments.

As to be perfectly just is an Attribute in the divine Nature, to be so to the utmost of our Abilities is the Glory of a Man. Such an one, who has the public Administration in his Hands, acts like the Representative of his Maker, in recompensing the virtuous, and punishing the Offenders. By the extirpating of a Criminal, he averts the Judgments of Heaven, when ready to fall upon an impious People; or as my Friend *Cato* expresses it, much better in a Sentiment conformable to his Character,

When by just Vengeance impious Mortals perish,
The Gods behold their Punishment with Pleasure,
And lay th' uplifted Thunderbolt aside.

When a Nation once loses its Regard to Justice; when they do not look upon it as something venerable, holy, and inviolable; when any of them dare presume to lessen, affront or terrify those who have the Distribution of it in their Hands; when a Judge is capable of being influenced by any thing but Law, or a Cause may be recommended by any thing that is foreign to its own Merits, we may venture to pronounce that such a Nation is hastening to its Ruin.

(*a*) 4 *Ad.* 134.

I N T R O D U C T I O N:

I always rejoice when I see a Tribunal filled with a Man of an upright and inflexible Temper, who in the Execution of *his* Country's Laws can overcome all private Fear, Resentment, Solicitation, and even Pity itself. Whatever Passion enters into a Sentence or Decision, so far will there be in it a Tincture of Injustice. In short, *Justice* discards Party, Friendship, Kindred, and is therefore always represented as (a) blind, that we may suppose her Thoughts are wholly intent on the Equity of a Cause, without being diverted or prejudiced by Objects foreign to it.

Judges (b) ought to remember, that their Office is *Jus dicere*, and not *Jus dare*; to interpret, not give Law. Else will it be like the Authority claimed by the Church of *Rome*; which, under the Pretext of Exposition of Scripture, doth not stick to add and *alter*; and to pronounce that which they do not find; and by Shew of Antiquity to introduce Novelty. Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all Things, *Integrity* is their Portion and proper Virtue: "curfed," saith (c) the Law, "be he that removeth his "Neighbour's Land-Mark." The Mislayers of a mete Stone is to blame: but it is the *unjust Judge* that is the capital Remover of Land-Marks, when he defineth amiss of Lands and Property: one foul Sentence doth more Hurt than many foul Examples. For these do but corrupt the Stream: the other corrupteth the Fountain. So saith (d) *Solomon*; *Fons turbatus, & Vena corrupta, est justus cadens in Causâ suâ coram Adversario*. The Office of Judges may have Reference unto the Parties that sue; unto the Advocates that plead; unto the Clerks and Ministers of Justice underneath them; and to the Sovereign or State above them.

First, for the Causes or Parties that sue. There be, saith (e) the Scripture, that "turn Judgment into Wormwood;" and surely there be also that turn it into Vinegar: for Injustice maketh it bitter, and Delays make it sour. The principal Duty of a Judge is to suppress Force and Fraud; whereof Force is the more pernicious when it is open; and Fraud when it is close and disguised. Add thereto con-

(a) Judge *Dodderidge* was commonly called the sleeping Judge, because he would sit on the Bench with his Eyes shut, which was only a *Posture of Attention*, to sequester his Sight from distracting Objects, the better to listen to what was alledged and proved. *Ful. Worth. Devonsh.* 257.

(b) *Lord Bac.* 520. No. LVI.

(c) *Deuteronomy* xxvii. 17.

(d) *Prov.* xxv. 26.

(e) *Amos* v. 7.

I N T R O D U C T I O N.

tentious Suits, which ought to be spewed out as the Surfeit of Courts. A Judge ought to prepare his Way to a just Sentence, as God useth to prepare his Way, by raising Valleys and taking down Hills: so when there appeareth on either Side an high Hand, violent Prosecution, cunning Advantages taken, Combination, Power, great Counsel, then is the Virtue of a Judge seen, to make Inequality equal; that he may plant his Judgment as upon an even Ground. *Qui fortiter emungit, elicit Sanguinem*; and where the Wine-Press is hard wrought, it yields a harsh Wine that tastes of the Grape Stone. Judges must beware of hard Constructions and strained Inferences; for there is no worse Torture than the Torture of Laws: especially in Case of Laws penal they ought to have Care, that that which was meant for Terror be not turned into Rigour; and that they bring not upon the People that Shower whereof the Scripture (a) speaketh, *pluet super eos Laqueos*; for penal Laws pressed, are a Shower of Snares upon the People. Therefore let penal Laws, if they have been Sleepers of long, or if they be grown unfit for the present Time, be by wise Judges confined in the Execution; (b) *Judicis Officium est, ut Res, ita Tempora Rerum quærere*. In Causes of Life and Death, Judges ought, as far as the Law permitteth, in Justice to remember Mercy; and to cast a severe Eye upon the Example, but a merciful Eye upon the Person.

Secondly, for the Advocates and Counsel that plead: Patience and Gravity of hearing is an essential Part of Justice; and an *over-speaking* Judge is no well-tuned Cymbal. *It is no Grace to a Judge, first to find that which he might have heard in due Time from the Bar; or to shew Quickness of Conceit in cutting off Evidence or Counsel too short; or to prevent Information by Questions though pertinent.* The Parts of a Judge in hearing are four: to direct the Evidence; to moderate Length, Repetition, or Impertinency of Speech; to recapitulate, select, and collate, the material Points of that which hath been said; and to give the Rule or Sentence. Whosoever is above these is too much; and proceedeth either of Glory and Willingness to speak, or of Impatience to hear, or of Shortness of Memory, or of Want of a stayed and equal Attention. *It is a strange Thing to see, that the Boldness of Advocates should prevail with Judges; whereas they should imitate God, in whose Seat they sit: who represseth the presumptuous, and giveth Grace to the modest. But it is more strange, that*

(a) *Psalms xi. 6.*

(b) *Ovid's Trist. Lib. I. Eleg. I. 37. 38.*

I N T R O D U C T I O N.

Judges should have noted Favourites; which cannot but cause Multiplication of Fees and Suspicion of By-Ways. There is due from the Judge to the Advocate some Commendation and Gracing where Causes are well handled, and fairly pleaded; especially towards the Side which obtaineth not; for that upholds in the Client the Reputation of his Counsel, and beats down in him the Conceit of his Cause. There is likewise due to the Public a civil Reprehension of Advocates, where there appeareth cunning Counsel, gross Neglect, slight Information, indiscreet pressing, or an over-bold Defence. And let not the Counsel at the Bar chop with the Judge, or wind himself into the handling of the Cause anew, after the Judge hath declared his Sentence: but on the other Side, let not the Judge meet the Cause half Way; nor give Occasion to the Party to say, his Counsel or Proofs were not heard.

Thirdly, for that that concerns Clerks and Ministers. The Place of Justice is an hallowed Place; and therefore not only the Bench, but the Foot-Place, and Precincts, and Purprise thereof, ought to be preserved without Scandal and Corruption. For certainly Grapes, as the Scripture (a) saith, will not be gathered of Thorns or Thistles: neither can Justice yield her Fruit with Sweetness, amongst the Briers and Brambles of catching and polling Clerks and Ministers. The Attendance of Courts is subject to four bad Instruments. First, certain Persons that are Sowers of Suits; which make the Court swell, and the Country pine. The second Sort is of those that engage Courts in Quarrels of Jurisdiction, and are not truly *Amici Curiae*, but *Parasiti Curiae*, in puffing a Court up beyond her Bounds, for their own Scraps and Advantage. The third Sort is of those that may be accounted the left Hands of Courts; Persons that are full of nimble and sinister Tricks and Shifts, whereby they pervert the plain and direct Courses of Courts, and bring Justice into oblique Lines and Labyrinths. And the fourth is, the Poller and Exacter of Fees; which justifies the common Resemblance of the Courts of Justice to the Bush, whereunto while the Sheep flies for Defence in Weather, he is sure to lose Part of his Fleece. On the other Side, an ancient Clerk, *skilful in Precedents*, wary in proceeding, and understanding in the Business of the Court, is an excellent Finger of a Court, and doth many Times point the Way to the Judge himself.

Fourthly, for that which may concern the Sovereign and State. Judges ought above all to remember the Conclusion of the Roman

(a) *Matth. vii. 16.*

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twelve Tables; *Salus Populi suprema Lex*; and to know that Laws, except they be in order to that End, are but Things captious, and Oracles not well inspired.

The (a) Oath of a Judge.

“ The Judge swears, that well and lawfully he will serve our Lord the King and his People in the Office of Justice, and that lawfully he will counsel the King in his Business, and that he will not counsel nor assent to any Thing which may turn the King in Damage or Disherison by any Manner, Way or Color: and that he will not know the Damage or Disherison of the King, whereof he will not cause him to be warned by himself, or by other; and that he will do equal Law, and Execution of Right to all his Subjects, rich and poor, without having Regard to any Person. And that he will not take by himself, or by other, privily nor apertly, (b) Gift nor Reward of Gold nor Silver, nor of any other Thing which may turn to his Profit, unless it be Meat or Drink, and that of small Value, of any Man who shall have any Plea or Process hanging before him, as long as the same Process shall be so hanging, nor after for the same Cause. And that he will take no Fee, as long as he shall be Justice, nor Robes of any Man great or small, but of the King himself. And that he will give none Advice or Counsel to no (c) Man great or small, in no Case where the King is Party. And in Case that any of what Estate or Condition they be, come before him in his Sessions with (d) Force and Arms, or otherwise against the Peace, or against the Form of the Statute thereof made, to disturb Execution of the common Law, or to menace the People that they may not pursue the Law, that he will cause their Bodies to be arrested and

(a) Stat. 18 Ed. 3. St. 4.

(b) A Gentleman had sent L. C. Baron *Hale* a Buck for his Table, who had a Trial at the Assizes; and so religiously did his Lordship observe this Part of his Oath, that when he heard the Gentleman's Name, he asked if he was not the same Person that had sent him Venison; and finding he was the same, he told him, he could not suffer the Trial to go on till he had paid him for his Buck; to which the Gentleman answered, that he never sold his Venison, and that he had done nothing to him, which he did not do to every Judge that had gone that Circuit, which was confirmed by several Gentlemen present: but all would not do, for the Lord Chief Baron had learned from *Solomon*, that a *Gift perverteth the Ways of Judgment*, and therefore he would not suffer the Trial to go on, till he had paid for the Present; upon which the Gentleman withdrew the Record; and at *Salisbury* the *Dean* and *Chapter* having, according to Custom, presented him with six Sugar Loaves in his Circuit, he made his Servants pay for the Sugar before he would try their Cause. *Burn. Life of Hale.* 62. 63.

(c) Not even to a *French Ambassador*.

(d) See Stat. 2 Edw. 3. c. 3.

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put into (a) Prison; and in Case they shall be such that he cannot arrest them, that he will certify the King of their Names, and of their Misprision hastily, so that he may thereof ordain a convenable Remedy. And that he will not himself, nor by other, privily nor apertly, maintain any Plea or Quarrel hanging in the King's Court, or elsewhere in the Country. And that he will deny to no Man common Right by the King's (b) Letters, nor none other Man's, nor for none other Cause; and in Case any Letters come to him contrary to Law, that he will do nothing by such Letters, but certify the King thereof, and proceed to execute the Law, notwithstanding the said Letters (c): And that he will do and procure the Profit of the King

(a) The Imprisonment of *Henry Prince of Wales* seems no improper Comment on this Part of the Oath; Antiquaries, Lawyers and Historians have all given us an Account of this Transaction, which appears to have been thus. This Prince keeping ill Company, and led by ill Counsel, assaulted (some say struck) *Gascoigne* Chief Justice, sitting in the *King's Bench*, for that the Prince endeavouring with strong Hand to rescue a Prisoner, one of his unthieftly Minions indicted and arraigned at the *King's Bench* Bar for Felony, was prevented of his Purpose by the Persuasion and Commandment of the Chief Justice; for which Attempt the Chief Justice committed the Prince to the *King's Bench*, whereof some of his Followers instantly complained to the King his Father, who informing himself of the true State of the Case, gave God Thanks that he had given him a Judge who dared to administer, and a Son who submitted to obey, Justice. 3 Inst. 225. 2 Gibs. Camd. Brit. 868. 869. Ful. Worth. Yorksb. 199. 5 Cap. Shakesp. Hen. IV. 2d Part. Act V. Sc. 2. How. Medul. Hist. Angl. 110. H. H. P. C. 128. Crompt. on Courts. 79. Bar. Atk. Law Tracts. 89. 90.

Sir *Henry Spelman* calls our Judge, "*Gascoigne* of Roman Fortitude," for this Commitment. *Spelm. Gloss.* 342. This is that Prince, who abandoning his former Company and Counsel, and following the Advice of grave, wise and expert Men, whom he made Choice of to be of his Counsel, became that victorious and virtuous King *Henry the Fifth*, who was prosperous in all he took in Hand, at Home and Abroad. 3 Inst. 225.

(b) Though *England* ought never to forget the happy Reign of *Queen Elizabeth*, yet it must be acknowledged, that she as well as others had her Failings. She was full of Love to the People, just in her Nature, sincere in her Intentions; but could not so perfectly discover the Snares that were laid for her, or resist the Importunity of the Persons she most trusted, as not sometimes to be brought to attempt Things against Law. She and her Counsellors pressed the Judges very hardly to obey the Patent under her Great Seal, in the Case of *Cavendish*, [*Anderf. Rep.* 155.] but they answered, "That both she and they had taken an Oath to keep the Law; and if they should obey her Commands, the Law would not warrant them, &c." And besides the Offence against God, their Country, and the Commonwealth, they alledged the Example of *Empson* and *Dudley*, "whereby," they said, "they were deterred from obeying her illegal Commands." They who had sworn to keep the Law notwithstanding the King's Writs, knew that the Law depended not upon his Will; and the same Oath that obliged them not to regard any Command they should receive from him, shewed that they were not to expect Indemnity by it. *Sid. on Gov.* 355. Chap. 3. Sect. 22. and we may add *Warram's Case* of *East. Term.* 1587. 29 El. in the *King's Bench*. *Warram* prayed an Allowance of a Protection, which was delivered into Court by Serjeant *Fenner*, and run thus: "That we (*Queen Elizabeth*) have taken under our Protection, by Virtue of our royal Prerogative, the Body, Lands and Goods of *Warram*, and we forbid any Inquiry to be made, or our Prerogative to be argued;" and *Wrey* C. J. was of Opinion, that the Protection was not allowable, and though he would not suffer the Prerogative to be argued, yet as a Judge he would consider of it; and he was of Opinion, that a Prerogative tending highly to the Prejudice of the Subject was not allowable; to which all, viz. *Jeffreys*, *Glencoe* and *Shute* agreed, and the Prerogative was not allowed. *Mo. Rep.* 239. pl. 374.

(c) Stat. 20 Edw. 3. c. 1. Lord *Coke* says, that this is no Act of Parliament. 3 Inst. 146. 224. and

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and of his Crown with all Things ; where he may reasonably do the same. And in Case the Judge be from henceforth found in Default in any of the Points aforesaid, he shall be at the King's (a) Will of Body, Lands and Goods, thereof to be done as shall please him, as God the Judge help and all Saints."

If the Judges are therefore to act according to a set Rule, from which they may not depart, what Command soever they receive, they do not act by a Power from the King, but by one that is above both the Law and the King. This is commonly confessed ; and though some Judges have been found in several Ages, who, in Hopes of Reward and Preferment, have made little Account of their Oath, yet the Success that many of them had, may reasonably deter others from following their Example ; and if there are not more Instances in this Kind, no better Reason can be given, than that (b) Nations do frequently fail, by being too remiss in asserting their own Rights, or punishing Offenders, and hardly ever err on the severer Side.

However, the (c) Law hath been so often, and so severely executed, that it concerns all Judges to be on their Guard ; and the Cases of *Tresilian*, *Empson*, *Dudley*, and others, shew, that neither the King's preceding Command, nor subsequent Pardon, could preserve them from the Punishment they deserved. All Men knew, that what they did was agreeable to the King's Pleasure ; for *Tresilian* advanced the Prerogative of *Edward the Second*, and *Empson* brought great Treasures into the Coffers of *Henry the Seventh*. Nevertheless, they were charged with Treason for subverting the Laws of the Land, and executed as Traitors.

The Names of the present Judges of *England*.

The Right Honourable *William* Lord (d) *Mansfield*, Lord Chief Justice of the Court of *King's Bench*.

(a) Lord *Coke* says, that by these Words of the Oath, [to be at the King's Will for Body, &c.] the Judgment (*quod suspendatur*) cannot be warranted ; for those Words cannot be extended to Loss of Life ; but only to Imprisonment, &c. viz. Loss of Liberty, &c. 3 Inst. 146.

(b) *Sid.* on Govern. 370. Chap. 3. Sect. 26. *Jure igitur plectimur ; nisi enim multorum impunita Scelera tulissemus, nunquam ad unum tanta pervenisset Licentia. Cic.*

(c) *Sid.* on Govern. 355. Chap. 3. Sect. 22. See *id.* 370. Chap. 3. Sect. 26.

(d) See " *Pieces autentiques pour servir au Proces criminel intenté, au Tribunal du Roi d'Angleterre, par le Chevalier D'Eon de Beaumont, Ministre plenipotentiaire de France, contre Claude Lewis Francois Regnier, Comte de Guerchy, Ambassadeur extraordinaire de France, auprès de sa Majesté Britannique. Le Trone a-t-il été pour vous associé à l'Iniquité ? vous que vous servez de l'Autorité que vous à été conféré, pour exercer des Injustice. A Berlin, Chez Pierre Bordeaux 1765.* "

Sir

I N T R O D U C T I O N.

Sir *Joseph Yates*, Knight, second Judge.

Sir *Richard (a) Ashton*, Knight, third Judge.

Edward Willes, Esquire, puisne Judge.

The Right Honourable Sir *John Eardley Wilmot*, Knight, Lord Chief Justice of the Court of *Common Pleas*.

Sir *Edward Clive*, Knight, second Judge.

Sir *Henry Bathurst*, Knight, third Judge.

Sir *Henry (a) Gould*, Knight, puisne Judge.

The Right Honourable Sir *Thomas (a) Parker*, Knight, Lord Chief Baron of the Court of *Exchequer*.

Sir *Sidney Stafford (b) Smythe*, Knight, second Baron.

Sir *Richard Adams*, Knight, third Baron.

Sir *George Perrott*, Knight, puisne Baron.

“ God (c) is heartily to be prayed unto, that those who occupy
“ the Place of *Justice* may so behave themselves, as it may appear,
“ that they do not exercise the Judgments of Man, but of God
“ himself, the Chief Justice of the World : for so shall the Good be
“ succoured, and the Evil suppressed, so shall the Judges themselves
“ be well acquitted, so shall his Majesty be duly served, and God
“ himself honoured aright.”

(a) See the Trial of *Samuel Gillam*, Esquire, one of his Majesty's Justices of the Peace, for the County of *Surry*, at the *Old Bailey*, on Monday the 11th of July 1768, for a supposed Murder committed in Pursuance of his Orders, at the *Massacre* in *St. George's Fields*, on Tuesday the 10th Day of May 1768.

(b) See the Trial of *Donald Maclane*, at *Guildford Affizes*, on Monday the eighth Day of August 1768, for the supposed Murder of *William Allen* the younger, at the *Massacre* in *St. George's Fields*, on Tuesday the tenth Day of May 1768.

(c) *Lamb. Arch.* 278.

N A M E S

NAMES of CASES

Cited, remarked on, approved, or censured in the
Course of this Work, with Notes explaining the Nature
of them.

A.		Dowling (b). P. 9.	
A LMON (a). P. 36.		E.	
Ashley (b). (Serjeant at Law) P. 26.		Erskine (d) (Admiral) P. 34.	
B.		F.	
Browne (Doctor) (c). P. 32.		Frankland (d) (Admiral) P. 34.	
Byng (d) (Admiral) P. 34.		H.	
C.		Hamar (d) (Admiral) P. 34.	
Callis (d) (Admiral) P. 34.		Hamilton (d) (Admiral) P. 34.	
Catford (d) (Admiral) P. 34.		Hanway (d) (Admiral) P. 34.	
Colby (d) (Admiral) P. 34.		Harper (b). P. 26.	
D.		Harrison (k). P. 26.	
D'Eon (f). P. 20.		Hengham's (l) (L. C. J. B. R.) P. 54.	
Diggs (b). P. 26.		Hingate (i). P. 26.	

(a) Attachment pressed for, but not granted, for (therefore, we presume) a supposed Libel on a chief Magistrate, and for a supposed Intimation, that he might be impeached for his Behaviour as a Judge. See Letter to Mr. Almon from the Father of Candor. P. 128. first Edit.

(b) Not attached for accusing Lord Keeper Coventry of Injustice, Bribery, and Corruption.

(c) Not attached, but informed against in the Queen's Bench, for libelling the supreme Magistrate (Lord Keeper Cowper) of the Kingdom.

(d) No Attachment, no Information, no Indictment but only a Censure passed on him, and a Submission required for libelling the late Lord Chief Justice Willes.

(f) His Arguments to shew that the Publication of his "Lettres," &c. concerning the French Ambassador de Guerchy, were not libellous in the Opinions of the English Lawyers, and Writers on the Crown Law, concerning Libels.

(b) For publishing a Libel on the Proceedings of the Court of King's Bench, on a Trial, not for only selling the mere Trial.

(k) Not attached, but indicted for accusing a Judge of High Treason.

(l) Fined for altering a Record.

N A M E S of C A S E S.

J. <i>Jeffs (a)</i>. P. 26. L. <i>Laton (b)</i> (Admiral). P. 34. <i>Lee (c)</i>. P. 26. <i>Legge (b)</i> (Admiral) P. 34. <i>Libellis de famosis (d)</i>. P. 15. <i>Lilburne (e)</i>. P. 27. 86. M. <i>May (c)</i>. P. 26. <i>Mayer (f)</i>. P. 9. <i>Mayne (b)</i> (Admiral) P. 34. <i>Middleton (b)</i> (Doctor). 9. Note (b). <i>Molloy (b)</i> (Admiral) P. 34. N. <i>Northampton John de (i)</i>. P. 15.	<i>Norton (c)</i>. P. 26. O. <i>Orme (b)</i> (Admiral). P. 34. P. <i>Parkins (k)</i> Sir William. 49. in Note. <i>Pittman (b)</i> (Admiral) P. 34. R. <i>Rentone (l)</i> (Admiral) P. 34. S. <i>Smith (c)</i>. P. 26. <i>Smollet (b)</i> (Doctor) P. 9. Note (b). <i>Spragge (l)</i> (Admiral) P. 34. W. <i>Wilkie (o)</i>. P. 36. <i>Winston (c)</i>. P. 26.
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- (a) For accusing L. C. J. Coke of Treason and Perjury as a Judge, *indicted*, not attached.
- (b) No Attachment, no Information, no Indictment, but only a Censure passed on him, and a Submission required for libelling the late L. C. J. Willes.
- (c) Not attached for accusing Lord Keeper Coventry of Injustice, Bribery and Corruption.
- (d) The Resolutions of the Star-Chamber Judges in this Case, concerning Libels, refuted.
- (e) His Sentence for a Contempt of the Court of Star-Chamber in refusing to take an Oath to answer Interrogatories on a Contempt, reversed, as *illegal*, by Parliament.
- (f) For publishing a Libel on the Proceedings of the Court of King's Bench, on a Trial, not for only selling the mere Trial.
- (b) The Printer as well as the real Publisher were excused, on the Doctor his confessing himself the Author of the Libel, which was deemed a most honourable Action.
- (i) This Person was an Attorney of the Court of King's Bench, and the Prosecution was for charging all the Judges of that Court with Breach of their Duty, in their judicial Offices; the Proceedings, however, were not by Attachment, but it must be recollected that they were so long ago as the Reign of King Edward the Third.
- (k) Instance of Lord Ch. Justice Hale's Strictness in adhering to the Law.
- (l) A mere Censure and Submission, neither Attachment, Information, or even Indictment, for libelling the late L. C. J. Willes.
- (o) Not punished, though Attachment granted, for censuring the Opinion of the Court of Common Pleas, (delivered by L. C. J. Pratt, now Lord Chanc. Camden) on their discharging John Wilkes, Esquire, from the Tower.

A C T S

ACTS of PARLIAMENT

tabled in chronological Order.

Henry the Third.

9 Hen. 3. c. 14. P. 55.
c. 29. P. 84. 93.

Edward the First.

3 Edw. c. 34. P. 39.

Edward the Third.

2 Edw. 3. c. 3. Introduction.
5 Edw. 3. c. 9. P. 93.
14 Edw. 3. c. 6. P. 55. 56.
18 Edw. 3. St. 4. Introduction.
20 Edw. 3. c. 1. Introduction.
25 Edw. 3. St. 5. c. 4. P. 93.
28 Edw. 3. c. 3. P. 93.
36 Edw. 3. c. 15. P. 93.
41 Edw. 3. P. 74.
42 Edw. 3. c. 3. P. 93.

Richard the Second.

2 Rich. 2. St. 1. c. 5. P. 39. 80.
8 Rich. 2. c. 4. P. 51. 66. 67.
12 Rich. 2. c. 11. P. 39. 80.

Henry the Fourth.

13 Hen. 4. c. 7. P. 80.

Henry the Fifth.

9 Hen. 5. c. 4. P. 57.

Henry the Sixth.

4 Hen. 6. c. 3. P. 57.
8 Hen. 6. c. 12. P. 57.
c. 15. P. 58.

Henry the Seventh.

3 Hen. 7. c. 1. P. 74. 75. 76. 81. 82.
83. 93.
11 Hen. 7. c. 3. P. 84. 85.

Henry the Eighth.

21 Hen. 8. c. 20. P. 81. 94.
33 Hen. 8. c. 1. P. 80.

Philip and Mary.

4 & 5 P. & M. c. 8. P. 80.

Elizabeth.

ACTS of PARLIAMENT.

Elizabeth.

Anne.

5 El. c. 9. P. 80.

5 El. c. 10. P. 80.

14. id. id.

27 El. c. 4. id. id.

10 An. c. 19. P. 41.

George the First.

Charles the First.

5 Geo. c. 13. P. 58. 60.

16 Car. c. 10. P. 92.

George the Third.

William and Mary.

1 Geo. 3. c. 23. P. 66.

1 W. & M. Sef. 2. c. 2. P. 89.

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51.	36.	for from read by.
		In Notes for 8 Rich. 3. read 8 Rich. 2.
55.		In Notes after 9 Hen. 3. add c. 14.
59.		In Notes after Profession read his Agent.
66.	23.	before Committee add grand.

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ATTACHMENTS

ATTACHMENTS

O F

CONTEMPT.

279-1414-11

CONFIDENTIAL

A N
I N Q U I R Y

INTO THE

D O C T R I N E,

LATELY PROPAGATED CONCERNING

ATTACHMENTS of CONTEMPT

UPON THE

PRINCIPLES of LAW, and the CONSTITUTION,

Particularly as they relate to the mere selling contemptuous Writings,

On JUDGES, or COURTS of JUSTICE.

With NOTES, REFERENCES, and OBSERVATIONS.

By an ENGLISH CROWN LAWYER.

Judicium Parium, aut Lex Terræ.

Lord Chanc. Camden's Motto, from *Magna Charta*

IN COUNTY

IN THE

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A N

I N Q U I R Y, &c.

A (*a*) Contempt is a Disobedience to the Court, or an opposing or despising the Authority, Justice, or Dignity thereof; it commonly consists in a Party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the Process, Order, or Decree of the Court.

Sometimes it arises by one or more, their opposing or disturbing the Execution or Service of the Process of the Court, or using Force to the Party who serves it; sometimes by using Words (*b*) importing Scorn, Reproach, or Diminution of the Court, its Process, Orders, Officers or Ministers, upon executing or serving such Process or Orders.

It is also a Contempt to abuse the Process of the Court, by wilfully doing any Wrong in executing it, or making Use of it as an Handle to do Wrong; or to do any Thing under Color or Pretence of Process or Authority of the Court, without such Process or Authority.

(*a*) *Vin.* Abr. 442. pl. 1. See *Bac.* Abr. 181.

(*b*) *Str.* 185. A Motion was made for an Attachment against the Defendant for speaking contemptuous Words of the Court, at the Time he was served with a Writ of Privilege. But it appearing, that the Defendant only told the Plaintiff he would make him eat it, if he left it with him, the Court thought that would hardly be enough, but yet made a Rule upon him to shew Cause. Judge *Reynolds* mentioned a much stronger Case than this, which was about two Years ago, where a Defendant actually made a Bailiff eat a Writ, which he served him with, and yet the Court would not there grant an Attachment. *Barnard.* B. R. 56. See *Str.* 444, 2 *Str.* 1086.

All (a) Courts of Record have a Discretionary Power over their own Officers, and are to see that no Abuses be committed by them, which may bring Disgrace on the Courts themselves; therefore if a Sheriff or other Officer, shall be (b) guilty of corrupt Practice in not serving a Writ, as if he refuse to do it unless paid an unreasonable Gratuity from the Plaintiff, or receive a Bribe from the Defendant, or give him Notice to remove his Person or Effects, in order to prevent the Service of any Writ; the Court which awarded it may punish such Offences, in such Manner as shall seem proper by Attachment.

But if there be no palpable Corruption, nor extraordinary Circumstances of wilful Negligence or Obstinacy, the Judgment whereof is to be left to the Discretion of the Court; it seems not usual to proceed in this Manner, but to leave the Party to his ordinary Remedy against the Sheriff, either by Action or by Rules to return the Writ, or by an *Alias* and *Pluries*, which if he have no Excuse for not executing, an Attachment goes of Course.

Also Sheriffs and other Officers are liable to an Attachment for an oppressive or illegal Practice in the Execution of a Writ; as using needless (c) Force, Violence or Terror, treating Persons under an Arrest (d) basely and inhumanly, extorting Money from them, &c. or making an Arrest without due Authority, as by Colour of a blank (e) Warrant, filled up without the Privy or subsequent Agreement of the Sheriff.

Also an Attachment is grantable for corrupt Practice, in not executing a Writ effectually, as if a Sheriff having levied a Debt on an Execution (f) imbezzles the Money.

Also an Attachment is grantable in Discretion for a false (g) Return to a Writ, but this is not (h) usually done without some visible Corruption, or extraordinary Circumstances of Malice, Hardship or Oppression.

Attornies (i) are liable to an (k) Attachment, and have been punished in this Manner in numberless Instances; as for prosecuting or defend-

(a) *Bac. Abr.* 181.

(b) 2 *Hawk. P. C.* 142. Chap. 22. Sect. 2.

(c) 2 *Hawk. P. C.* 143. Chap. 22.

(d) *Hob.* 62. pl. 62. id. 263. 264.

(e) *Noy's Rep.* 101. *Mo.* 770. pl. 1064. 2 *Rol. Abr.* 278. (H.) *H. H. P. C.* 457. 10 *St. Tri.* 478. But there may be some special Circumstances which may induce the Court to excuse it, as that the Practice was so, and that it was done to prevent the Party's having Notice of the Arrest. 2 *Hawk. P. C.* 143. Chap. 22. Sect. 3. but *quere* this Doctrine and see *Stevenson's Trial* in 10 *St. Tri.*

(f) 2 *Hawk. P. C.* 143. Chap. 22. Sect. 4.

(g) 2 *Hawk. P. C.* 143. Chap. 22. Sect. 5.

(h) Because an Action on the Case lies against the Sheriff. *Bac. Abr.* 181.

(i) 2 *Hawk. P. C.* 144. Chap. 22. Sect. 10.

(k) All Attachments issue from the Crown Office Side. *Lil. Pract. Reg.* 158. G.

ing a Suit, without Directions from the Party; for base and unfair Dealings towards their Clients, in the way of Business; as for protracting Suits by little Shifts, demanding Money for Business never done, detaining (a) their Clients Writings, or their Money recovered and received by them; for disobeying (b) the Rules of Court, of which they have Notice either expressly or impliedly; or for executing them (c) improperly; also for (d) forging a Writ, or any other Matter of Record, or but attempting to do it; or for taking out a *Capias*, which has no Original to warrant it, or for receiving (e) Money of a Client for suing out an Original, and for the Fine due thereon to the King, where in Truth no Original was sued out, nor any Fine paid to the King; or for endeavouring to impose on the Court, as by causing an Action to be brought against one in it, by Collusion, without any just Ground, in order thereby to intitle the Party to the Privilege of the Court, and afterwards, upon Examination of the Matter in Court, giving a false Account of it; or for giving (f) Directions to a Sheriff concerning what Persons he should return on a Panel; or for putting (g) to the Process of the Court the Name of an Attorney without his Authority; or for (h) assigning for Error the Death of the Plaintiff in Ejectment; or for (i) serving Process on Party attending his Cause.

Also all other Officers of Courts of Record are in like Manner punishable for disobeying (k) the Commands of such Courts, or for

(a) It is an established Rule of the Court of B. R. that wherever Deeds or Writings come to an Attorney in the Way of his Business, to compel him to re-deliver them to the Person of whom he received them; though he loses them by Accident. 2 *Barnard. B. R.* 263. for as he is entrusted with them, the Court will compel him to execute the Trust, he being subject to the Justice of the Court; and 'tis not material, whether he is an Attorney of this Court or not, if he practices therein, and the other Courts have the same Power over the Attornies of this Court, and they have gone so far as to compel a Counsel to deliver up Writings entrusted with them. 8 *Mod.* 340. Lord *Raym.* 738. S. P. by *Holt. Ch. Just.* 12 *Mod.* 516. But the Court will seldom grant an Attachment for the Detainer of such Writings or Money, without first making a Rule on the Attorney to deliver them to the Party. *Bac. Abr.* 192. Also it will justify an Attorney's detaining such Writings or Money for his Security, till he is paid all his just Fees. *Moseley* 13. *Comb.* 43. 8 *Mod.* 306. 11 *Vin. Abr.* 79. pl. 53. nor will it ever interpose by Attachment as to any Writings or Money, received by an Attorney on any other Account, except only in his way of Business, as an Attorney, but will leave the Party to his ordinary Remedy by Action. *Salk.* 87. pl. 5. unless the Attorney had engaged to return the Writings at all Events. *Str.* 621. 8 *Mod.* 339.

(b) 2 *Hawk. P. C.* 145. Chap. 22. Sect. 11.

(c) 2 *Bur. Rep.* 797.

(d) *Cro. Car.* 74. pl. 2.

(e) *Com. Dig.* 475. 20 *Hen. 6.* 37. a. 2 *Inst.* 215. 4 *Inst.* 101. *Helt.* 29. *Lit. Rep.* 46. *Cro. Car.* 74. pl. 2.

(f) *Mo.* 882. pl. 1237.

(g) *Bur. Rep.* 20.

(h) 2 *Str.* 899.

(i) 2 *Str.* 1094. *Andr.* 275.

(k) 2 *Hawk. P. C.* 145. Chap. 22. Sect. 11.

executing

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executing them oppressively, or otherwise misdeameaning themselves in their Offices.

Gaolers are punishable in this summary Way, for gross Misbehaviours in their Offices, by the Courts to which they more immediately belong; also for disobeying a *Habeas (a) Corpus* issuing out of a Court which has Authority to award it; and by the Court of King's Bench, for using Prisoners *(b)* barbarously and inhumanly.

The Court of *King's (c) Bench*, as it has a Superintendancy over all inferior Courts, may grant an Attachment against the *(d)* Judges of such Courts, for oppressive, unjust, or irregular Practice, contrary to the obvious Rules of natural Justice; as for denying the Defendant a Copy of the Declaration, or going on to Trial without giving him Notice, or Time to make his Defence, or for compelling him to give exorbitant Bail, or for taking unreasonable Distresses, or for taking Money for vitious Pleading, or for proceeding after a Prohibition, *Certiorari*, &c.

An Attachment is the proper Remedy for Disobedience *(e)* of the Rules of Court; as of those made in Ejectment, *(f)* Arbitrament, &c. So where a Defendant in Accompt, being adjudged to accompt before Auditors, refuses to do it, unless they will allow Matter disallowed by the Court before; or where one refuses to pay Costs taxed by the Master, whose Taxation the Law looks upon as a Taxation by the Court.

Also an Attachment is proper for Abuses of the Process of the Court, as for suing out *(b)* Execution where there is no Judgment; bringing an Appeal for the Death of one known to be alive; making use of a Process of a superior Court, as a *(i)* Stale to bring a Defendant within the Jurisdiction of an inferior one, and then dropping it; using such Process in a vexatious, *(k)* oppressive, or unjust Manner, without Colour of serving any other End by it; or for challenging *(l)* the Array for want of Hundredors, on a Rule by Consent for a special Jury.

A *(m)* Contempt to a Court of Justice must be certain, and not doubtful; for else the Party may perchance be wrongfully committed, which the Court will be cautious not to do.

(a) 2 Hawk. P. C. 151. Chap. 21. Sect. 31.

(b) 2 Hawk. P. C. 152. Chap. 22. Sect. 31.

(c) 2 Hawk. P. C. 149. Chap. 22. Sect. 25.

(d) Keb. Rep. 484. pl. 19. Palm. 564. Salk. 201. pl. 3. 4. 7 Mod. 1. 38. 84.

(e) 2 Hawk. P. C. 153. Chap. 22. Sect. 37.

(f) 10 Mod. 333. 12 Mod. 234. 257. 317. Stra. 695. Barnes. 41. Salk. 71. pl. 6. 83. pl. 1. 7 Mod. 8. 2 Lord Raym. 857. Stra. 695. Mod. Rep. 21. pl. 56.

(g) 2 Hawk. P. C. 154. Chap. 22. Sect. 39.

(h) 2 Hawk. P. C. 154. Chap. 22. Sect. 40.

(i) 2 Hawk. P. C. 154. Chap. 22. Sect. 41. Sav. 14. pl. 36.

(k) 3 Bac. Abr. 251. 2 Lord Raym. 1364. Stra. 593. 8 Mod. 245. 2 Stra. 10001.

(l) Lil. Pract. Reg. 427. H.

Upon a Motion for an Attachment against the Defendant for (a) *publishing* a Libel on the Court of *King's Bench*, and a Rule made upon him to shew Cause why it should not be granted, it was moved to discharge that Rule upon an Affidavit, that his Fault was not wilful, but merely through Ignorance; that he had the Libel from one C. a Printer in C. that it was in *Latin*, which he did not understand, and that he did not know who was the Author, otherwise than by a Letter he received from the Printer, and which was now annexed to his Affidavit; by which Letter it appeared, that one Dr. *Middleton* was the Author; so that having shewed how he came by this Letter, and having told all he knew of the Author, for that Reason it was insisted, in his Behalf, that the Rule should be discharged, and that the Printer should be prosecuted; but the Rule was continued on the Defendant, until he made out his Allegation against the Printer, who was therefore joined in the Rule, that both of them might be before the Court. In the next Term Dr. *Middleton* appeared, and (b) confessed in Court that he was the Author of the Book, and thereupon the Rule was discharged against the Defendant and the Printer (c).

On Rule to shew Cause why an Attachment should not be granted against one *Elizabeth Mayer*, and one *Dowling*, for *publishing* [not for the mere selling] a Libel upon the Proceeding of the Court in a late Trial of Lady *Lawley*. Mr. *Marsh* said, that he was Counsel only for Mrs. *Mayer*, but he hoped, the Rule should not be made absolute against her. He said Mrs. *Mayer's* Husband kept a Pamphlet Shop, and one Day in his Absence Mr. *Vaughan* came and asked her whether she had Lady *Lawley's* Trial; the Woman did not know it was in the Shop; but upon looking into a Drawer of Papers she found it. He said, that he had an Affidavit to produce, that she knew nothing of the Contents. Mr. *Vaughan* would willingly have bought it of her; she refused to sell it him; but told him he might read it, which he accordingly did. The Court said that it was beyond all Question, that Attachments have been granted in these Cases, and particularly mentioned Dr. *Middleton's* Case, where it was so done. Lord Chief Justice *Raymond* said likewise, that he thought it was not material whether Mrs. *Mayer* knew of the *Purport* of this Writing or not. However, the Court in general agreed to discharge the Rule as to

(a) Observe that it was for *publishing* not for mere selling.

(b) My Lord *Fortescue* says, this was an honourable Action in Dr. *Middleton*; for the first Motion was made against the Bookseller for *publishing* (not mere selling) the Book as above, but he was excused (though the real *Publisher*) on his getting the Doctor to confess that he was the Author. *Fortesc. Rep.* 201. And Dr. *Smollet* behaved as honourably with regard to his Printer, on a similar Occasion. See Dig. Lib. 81.

(c) 8 Mod. 123.

her, because there did not appear to be any Publication by her. They said likewise, that they could not make the Rule absolute as to *Dowling*, because there was no Affidavit of Service (a).

If the Contempt happens to be done by a Person present in Court, and appears either from the Confession of the Party, on his Examination upon Oath, or by the View or immediate Observation of the Judges themselves, the Court may immediately record the Crime, and commit the Offender, and also inflict such farther Punishment as shall seem (b) proper: And if such Offences be done by a Person not present in Court, and be complained of by Affidavit, the Court will either make a Rule on the Party to (c) attend at a certain Day, in order to answer the Matter of the Complaint against him; or else will make a Rule upon him to shew (d) Cause, why an Attachment should not be granted against him; or else, if the Offences were of a very exorbitant Nature, as for Words of Contempt of the Court itself, will grant an Attachment on the first Complaint, without (e) any such Rule to shew Cause; and the Party who is ordered to attend the Court in Pursuance of such Rule, ought regularly to appear in proper (f) Person, and not by Attorney, as also must every one against whom an Attachment is granted; and if the Offence be of an heinous Nature, and the Person attending the Court upon such Rule to answer it, or appearing upon an Attachment, be apparently guilty, the Court will generally commit him immediately, in order to answer Interrogatories to be exhibited against him in Relation to such Contempt. But if there be any favourable Circumstances to extenuate or excuse the Offence, or if it appear (g) doubtful whether the Party were guilty of it or not, the Court will generally in their Discretion, suffer the Party, having first given (h) Notice of his Intention to the Prosecutor, to enter into a Recognizance to answer such (i) Interrogatories; and if no such Interrogatories be exhibited within (k)

(a) 2 *Barnard. B. R.* 43.

(b) *T. Raym.* 376. *Cro. Car.* 146. pl. 25.

(c) *Rol. Rep.* 315. pl. 26.

(d) The Court of *B. R.* said, that in all other Cases, except Costs for not going on to Trial, they do make a Rule to shew Cause. *Barnard. B. R.* 354.

(e) *Salk.* 84. pl. 4. *Str.* 185.

(f) 3 *H.* 7. 6. pl. 4.

(g) 6 *Mod.* 73.

(h) Such Notice is not necessary, if the Party's Sureties to answer are the same Persons as were bound for his Appearance.

(i) *Probyn* Judge of *B. R.* said, that the Interrogatories must be confined to the Facts charged in the Affidavits. 2 *Barnard. B. R.* 219. If impertinent Interrogatories be put to a Person who is ordered to answer Interrogatories, his Way is to demur to them; for there is no Way but to answer, or demur: and there ought not to be an Interrogatory leading the Party to a Penalty. 12 *Mod.* 499. *Str.* 444. *S. P.*

(k) It was agreed by the Court of *King's Bench*, that if Interrogatories be not exhibited within a Week, the Recognizance entered into for answering them is discharged of Course. [See *Atk.*

four Days after such Recognizance, will discharge the Recognizance upon (a) Motion; yet if the Party do not make such Motion, and the Interrogatories be exhibited after the four Days, the Court will compel him to (b) answer them: but in all the Cases abovementioned, if the Party fully purge himself upon Oath, in his Answer to such Interrogatories of the whole Matter charged upon him, the Court will discharge him of the Contempt, and leave the Prosecutor to proceed against him for the Perjury, if he thinks fit (c): but if the Party confess part of the Contempts in his Answer to such Interrogatories, and deny others, the Court will not discharge him from the Contempts so denied, but will proceed farther to examine the Truth of them, and will inflict such Punishment as from the Whole shall appear reasonable; neither will the Court discharge the Party upon a shifting or evasive Answer to any material Part of the Charge against him, but will punish him in the same manner as if he had confessed it.

In Cases of great (d) Contempts, where the Party is examined on Interrogatories, and denies the Contempt, the Court of *Exchequer* have given Liberty to the other Side to examine Witnesses to falsify his Examination.

The Court of *Chancery* (e) never suffer Persons to be examined on Interrogatories to bring themselves into a Contempt, but where a Contempt is expressly sworn against them, give them Leave to be examined on personal Interrogatories, by Way of Purgation, in order to clear themselves.

By a standing Rule of the Court of *Chancery*, if the Contemnor, being examined on Interrogatories, denies the Contempt, the Prosecutor may take out a Commission to examine Witnesses to prove it;

Rep. 55.] It was also agreed by the Court, and by the Master of the Crown-Office, that in all Cases the Party hath four judicial Days to answer the Interrogatories, though they be exhibited in Vacation; but if he does not answer in that Time, he is to be committed upon Motion. 12 Mod. 310.

(a) If therefore an Attachment issues in the Beginning of *Trin.* Term, and is not made returnable till the last Return of that Term, and no Interrogatories exhibited within four Days after the Recognizance to answer them; the Party is, by this Proceeding, deprived of the Benefit of the Law; for as he hath no Opportunity of moving till *Mich.* Term, the Attachment hangs over his Head four or five Months after it ought to be discharged; besides the Inconvenience, nay, sometimes the Impossibility of recollecting Matters so long after the Transaction of them; for if the Party do not make such Motion, and the Interrogatories be exhibited after the four Days, the Court will compel him to answer them.

(b) But he shall not be examined on Oath by the adverse Party. 2 *Stra.* 1197.

(c) Dig. Lib. 131. 6 Mod 73. 7. *Jo.* 178. The Court of *Exchequer* gave Leave for the Person in Contempt to move for an Order for Liberty to examine Witnesses on his Part, to fortify the Denial of the Contempt. *Bunb.* 244. pl. 315.

(d) But note, this is only in great Contempts (for the Practice of B. R. and C. B. is otherwise.) *Bunb.* 244. pl. 315.

(e) *Moseley.* 250.

and the Contemnor can name only one Commissioner, and may cross-examine the Prosecutor's Witnesses, but cannot examine any Witnesses for him; but on proper Affidavits the Court of *Chancery* will give him Leave to examine Witnesses to some special Points; and Lord Chancellor (a) *King* declared, that he thought it a very hard Rule, and that since the Prosecutor might examine one in Contempt on Interrogatories, he ought to be content with his Oath.

Can any Thing be more absurd than to make a Rule on the Party, to attend at a certain Day, in order to shew Cause why an Attachment should not be granted against him, and when he personally appears in Court, to refuse him the Opportunity of vindicating himself? unless he will do it by Counsel, who decline to make *his* Defence, declaring to the Court that it is an improper one, that it is such an one as is not fit to be heard by the Court; such a Proceeding as this would be not only ridiculous, but also contrary to natural Justice. For it was held by *Edward the Fourth's* Chancellor and Judges, that to condemn a Person without hearing him, or giving him an Opportunity of defending himself, was contrary to the Law of Nature, such a Proceeding hath always been held illegal and void, by the Court of B. (b) R.

This Denial of Justice, hath however been termed, Grace, Favor, Indulgence, Tendernefs, and who can deny but that it hath been most properly so too? for suppose a Man appears personally in Court, either out of Respect to the Court, or from his Inability to fee Counsel to speak for him, in order to make his Defence to a Charge of having published a contemptuous Writing concerning the Court; such Party is not permitted to vindicate himself, because his *Defence* is presumed *libellous* before it is heard, and most *justly* so indeed; for what other *Defence* can a *Libeller* set up, but a *libellous Defence*; and therefore the Court upon such apparent Guilt will be obliged to commit the Party immediately, in order to his answering Interrogatories in Relation to the Contempt, in Custody.

If the Rule *nisi* is made absolute for an Attachment, on shewing Cause; it is the Course, that is the Law of the Court, to suffer the Party to enter into a Recognizance with two Sureties, to answer the Interrogatories; (he having been previously bound to appear at the Return of the Writ, and appeared accordingly) the Sum, in which the Party and Sureties are to be bound, is in the Discretion of the Court.

(a) *Moseley*. 312. pl. 173.

(b) 9 *Edw. 4.* 14. a. *Fortesc.* Rep. 206. 2 *Lord Raym.* 1343. See *Stra.* 567. 630. 678. *Sid.* 14. pl. 7. 2 *Sid.* 97. 4 *Mod.* 33. 37. *Salk.* 181. pl. 1. 2 *Salk.* 434. 435. 11 *Rep.* 99. a. *Styl.* 446. 452. *Lord Raym.* 225. 2 *Lord Raym.* 1405. 1407. 6 *Mod.* 41. 8 *Mod.* 3. 101. 154. 377. 12 *Mod.* 27. and many other Authorities, wherein the Judges of B. R. declare the above Doctrine to be Law.

This Discretion of the Court hath been thus most emphatically defined by one of the first Judges, as well for Ability as Integrity, in this Country.

“The Discretion of a Judge is the Law of Tyrants, it is always unknown; it is different in different Men, it is casual, and depends upon Constitution, Temper and Passion; in the best, it is oftentimes Caprice, in the worst, it is every Vice, Folly, and Passion, to which human Nature is liable.”

It is not long since, that the Justness of this Definition was remarkably verified; for one Judge insisted on 2000*l.* Bail, whereas another accepted 200*l.* for the self same Offence.

The Defendant having entered into a Recognizance, to answer Interrogatories; when they are ready, he is served with a written Notice of the Time, Place and Person he is to attend in order to be examined: he is not suffered to take a Copy, or even to have a Sight of the Interrogatories previous to his Examination; he may indeed demur to, that is, refuse to answer such of them as are leading or improper, but as the Defendant hath no Time allowed him to consider of the Propriety or Tendency of the Interrogatories, this Liberty of demurring to them, is altogether ridiculous, as it is almost impossible for the Defendant to avail himself of the Advantage, if such it be.

If the Defendant refuses to answer the Interrogatories, the Examiner certifies his Refusal to the Master (a) of the Crown Office, who upon hearing Counsel on both Sides reports his Opinion (upon its being moved for, as in civil Cases) to the Court, who thereupon discharge or punish the Defendant according to the said Report.

If the Defendant answers the Interrogatories, they, together with the Depositions are laid before the Master, and he proceeds thereon as before stated.

Neither Counsel or Solicitor is admitted on either Side before the Examiner, but the Parties are allowed both before the Master, and also Copies of the Interrogatories and Depositions, in order to clear or establish the Contempt.

I once heard a Judge declare from the Bench, that he was much surpris'd at a strange Notion which prevailed abroad, viz. “That a Reflection on one single Judge was not a Reflection on the whole Court;” and yet there seem Authorities in the Books, to support this Notion, at least such Inferences and Conclusions naturally result from them, as make them Cases in Point; for Instance,

(a) Now the learned *James Burrow, Esq.*

14 ATTACHMENTS of CONTEMPT.

The Court of *B. R.* will not grant an Attachment against one for disobeying an Order made by a Judge at *Nisi Prius* (a), (b) the *Old Bailey*, or at Chambers, unless the same be made a Rule of Court; and the Reason given is, for that it is *no Contempt to the Court of B. R. but only to the Judge who made the Order* (c).

On what other Reasoning, than that a Contempt of one single Judge is not a Contempt of the whole Court, could Lord *Ferrers's* Case be determined? which was thus:

An *Habeas Corpus* (d) had issued in the Vacation for him to bring his Countess before a Judge, which the Earl not doing, a Motion was made the ensuing Term for an Attachment for a Contempt in not obeying the Writ; but the Court was of Opinion it was *no Contempt to the Court*, the *Writ* not having issued by Virtue of a *Rule of the Court*, but only on the *Fiat* of a single Judge at Chambers; and the Motion was denied, and a Rule granted for another *Habeas Corpus*.

Having shewn the Nature of Contempts, upon what Occasions, and against whom Attachments have issued, and also the Proceedings thereon, it may not be unreasonable to conclude, that they were originally instituted for the Benefit of the Subject, that they were established to enforce Obedience to the Commands of Courts of Justice, that they were founded in Necessity; for if Courts of Justice were not possessed of such a Power, their Proceedings would be oftentimes vague and nugatory. However, it does not appear that it was usual for the Courts to extend this unconstitutional Process to Cases not attended with those special Circumstances, which have always been wisely thought necessary to support this Proceeding, a Proceeding wherein the Court exercises the distinct and peculiar Provinces of Party, Accuser, Judge, Evidence, and Jury (e): and they have therefore seldom granted this *Star-Chamber* Process against either the Authors, Printers, or even real Publishers of contemptuous Writings, reflecting on the Proceedings or Members of Courts of Justice, and never against the mere Sellers, when any of the others were amenable to Justice: as this is rather a bold Assertion, I shall now proceed to maintain it on the Principles of the Law and the Constitution, and for this Purpose shall take a cursory View of the Precedents and Examples of former Times, which seem most clearly to prove the above Assertion; such Reports, Cases and Arguments as may be thought to invalidate the Point I contend for, I shall endeavour to refute by Observations drawn from the Spirit of the Constitution.

(a) *Salk.* 84. pl. 3. *Bac. Abr.* 184. 2 *Hawk. Pl. Cr.* 154.

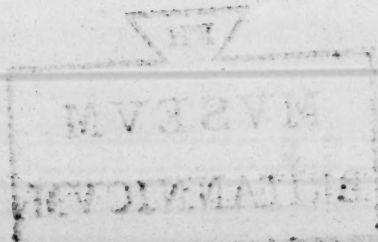
(b) *Dig. Lib.* 138.

(c) *Lil. Pract. Reg.* 163. F.

(d) *Dig. Lib.* 139.

(e) *Dig. Lib.* 138.

John



John (a) de Northampton, an Attorney of the Court of *King's Bench*, wrote a Letter to one of the King's Privy Counsel, that neither Sir *William Scot* Ch. Just. nor his Fellows the King's Justices, nor their Clerks, any great Thing would do by the King's Command, in that Place more than any other of the Realm; which said *John* being called, confessed the said Letter by him to be written by his own proper Hand: whereupon he was committed to the *Marshalsea*, and afterwards found Sureties for his good Behaviour; these Judges being Strangers to the *Star-Chamber* Severities.

It may be observed, that *John de Northampton* being an Attorney of the Court of *King's Bench*, stood in a special Relation to the Judges; and as all Duties are Consequents of the Relation of the Parties, they seem to have considered him as having acted an improper Part, inconsistent with his Duty to them, and to have proceeded against him accordingly.

Though this Letter, written by a forward, conceited and petulant Practicer of the Court, may be thought idle and impertinent; yet the Court declared, that as it was (b) *false*, it might cause the King's Indignation against the Court and his Justices, which would tend to their Scandal; the Matter charged upon him, I apprehend, was sufficient to constitute a Crime in any common Person, for it certainly implied a Breach of Duty in all the Judges of the Court of *King's Bench*. However, it does not appear that the Proceedings were by *Attachment*.

We (c) do not find much in the Year Books, or other old Reporters with Regard to the Offence of Libelling, till the great Case, intituled, *Karl v. E. & C.*, *De Libellis (d) famosis*, which is the Foundation of what hath since been considered as Law with Respect to Libels, and which was determined in the third Year of King *James the First*, by which Time Printing began to be tolerably cheap; and was thus:

The King's (e) Attorney proceeded upon the Party's own Confession, for composing and publishing an infamous Libel in Metre; by which *John* Archbishop of *Canterbury* (a Prelate of singular Piety, Gravity, and Knowledge, then dead) by Description and Circumlo-

(a) 3 Inst. 174.

(b) It is observable, that where the Punishment was severe, the Slander ought to be *false*, to incur it. Dig. Lib. 103.

(c) Bar. Observ. on Stat. 71.

(d) This Case is intituled by Lord *Coke*, who was no great civil Lawyer, "*De Libellis famosis*," which is the Title of the Chapter in the Roman Law. See Cod. ix. 36. And what Severity must we not expect from a Country in which, by the twelve Tables, in the Time of the *Decemvirs*, a Libeller was punished with Death? Bar. Observ. on Stat. 73. All the Learning intruded upon us *de Libellis famosis* was borrowed at once, or rather translated, from that slavish imperial Law, usually denominated the civil Law. You will find nothing of it in our Books higher than the Time of Queen *Elizabeth* and Sir *Edward Coke*.

(e) 5 Rep. 125. a.



cution,

cution, and not in exprefs Terms; and *Richard* then Archbishop of *Canterbury* was alfo traduced and scandalized.

As (a) every thing which relates to the Publication of what may be deemed a Libel, is of fo interesting a Nature to the Liberty of the Subject (ever fo clofely connected with the Liberty of the Prefs), I hope I may be indulged in fome few Observations upon the Doctrine delivered in this Cafe, and the particular Circumftances which might occafion an extraordinary Zeal and Warmth in the Court. The Libel then condemned was a fatyrical Ballad (at leaft it is ftated to be a Composition in Metre) upon an Archbishop of *Canterbury*, who was then dead, and likewife upon his Succelfor. An Archbishop of *Canterbury*, in more modern Times, would probably have only laughed at it, or invited the Author to Dinner; but the then Archbishop (under Pretence of the Infult upon the Memory of his Predeceffor) brought the *confitentem reum* before that *Englifh Inquifition* the *Star-chamber*. The Archbishop was the firft Judge, from his Rank, at leaft in this tyrannical Court, and therefore an Infult upon the Prefident could not but excite their warmeft Indignation. As the Libeller is ftated to have confefled both the writing and Publication of the Libel, the only Queftion before the Court muft have been what Fine or Punifhment they fhould inflict.

In this Cafe the Court of *Star-Chamber* was pleafed to come to feveral Refolutions, with Regard to the Doctrine of Libels, thefe I purpofe to confider.

One of the Refolutions was, that (b) if the Libel be againft a private Man, it deferves fevere Punifhment; if it be againft a Magiftrate or other public Perfon, it is a greater Offence.

I (c) do not mean to controvert the Reason, upon which this Rule is grounded, but it was moft clearly extrajudicial, as the Archbishop of *Canterbury* could not properly be deemed a Magiftrate; if, indeed his Seat in the *Star-Chamber* is fupposed to have given him a temporal Office, it muft be recollected, that he fat there *pro Salute Animæ* of the Criminals.

Another Refolution was, that although (d) the private Perfon or Magiftrate be dead at the Time of making the Libel, yet it is punifhable; for, in the one Cafe, it ftirs up others of the fame Family, Blood, or Society, to revenge, and to break the Peace; and, in the other, *the Libeller traduces and flanders the State, which dies not.*

(a) *Bar. obferv. on Stat. 71.*

(b) *5 Rep. 125. a.*

(c) *Bar. obferv. on Stat. 72.*

(d) *5 Rep. 125. a.*

This (a) Rule can never be supported to the Extent, in which it is delivered, without a Limitation of Time; and there is something very quaint in saying that if the dead Person libelled is a *Magistrate*, it is a *Reflection on Government, which never dies*.

Another of their Resolutions was, that (b) it is not material whether the Libel be true, or whether the Party against whom it is made be of good or ill Fame; for in a settled State of Government, the Party grieved ought to complain, for every Injury done him, in the ordinary Course of Law, and not, by any Means, to revenge himself, either by the odious Course of Libelling, or otherwise.

The above Rule (c), as to the Truth of a Libel being no Justification, is extrajudicial; as the Criminal confessed his Offence, it is impossible, that before that terrible Court (the *Star-Chamber*) he could have insisted upon having asserted nothing which was not true: this would have prevented his only Chance for Mercy in an intire and implicit Submission after a full Confession.

It not being material whether the Libel be true, or whether the Party against whom it is made be of good or ill Fame, contain, I apprehend, such a Proscription of Truth, and the Provision such a Sanctuary for weak and wicked Men, (who, through the unhappy Mistakes of Princes, the Power and Prejudice of Ministers, or the Combination, or other Influence of the Great, sometimes scruple not to make their Country a Convenience to themselves, their Adherents and Dependents, who sustain public Offices,) as are inconsistent with the Liberty and Safety of a free People, and would, in Effect, under some Princes, fix an indelible Character on their unqualified Ministers and their Partizans: I shall farther observe, that the Author of "State Law," who seems to have searched into all *English* Antiquity for Precedents of Judgments given in violent Times, to be produced *in Terrorem*; for he adduces several which, by his own Confession, are not Law at this Day, among other Things, writes thus; "but (d) undoubtedly Slanders which might do Mischief, [Words "of great Latitude] whether true or false, were punishable by the "old common Law," without shewing one Precedent or Authority for this Purpose; and Lord Coke, or the *Star-Chamber* Judges, having produced none to this Effect, it may be concluded, I conceive, that there are none to be found. During the Existence of the *Star-Chamber* Court, as well as since, it seems to have been a Point fully

(a) *Bar. Observ.* 72.

(b) *5 Rep.* 125. b.

(c) *Bar. Observ.* 72.

(d) *Introduct.* 4.

settled, that in Actions of Slander the Defendant might well justify his speaking of the slanderous Words charged upon him by an Averment, that they were true, "for though (as we are told) in Actions "for Words, the Law, through a Compassion, admits the Truth of "the Charge to be pleaded as a Justification, yet this Tenderness of "the Law is not to be extended to written Scandal, in which the "Author acts with more Coolness; and Deliberation gives the Scandal a more durable Stamp, and propagates it wider and further; "Whereas in Words Men often, in an Heat and Passion, say Things "which they are afterwards ashamed of, and, though they seem to "act with Deliberation, yet the Scandal sooner dies away and is "forgotten; and therefore from the greater Degree of Mischief and "Malice attending the one than the other, the Law allows the Party "to justify in an Action for Words, though not for written (a) "Scandal."

But as Speech and Writing are not of contrary Natures, differing only in Degree of Certainty and Permanence, and in the Mode of conveying to the Intellect the same Object of Consideration; I confess it has ever appeared strange to me, that the same Truth should be lawful, when orally delivered, and criminal when reduced into Writing. Lord Coke declared, that a Libel might be justified, if the Contents of it were true (b), and in Conformity to this Opinion his Lordship (c) cites, with Approbation, this old and excellent Rule, *Veritas, à quocunque dicitur, a Deo est*. "Truth, by "whomsoever spoken, is from God." On the Trial of the seven Bishops for a Libel, in presenting their Petition to the King, Mr. Justice (d) Powell, who by his Conduct acquired perpetual Honour; after hearing this *Star-Chamber Case de Libellis famosis* cited and relied on, and every Thing that was possible to be said for the Rejection of Truth, as immaterial, spoke thus to the Jury: "Gentlemen, to make it a Libel, it must be *false*;" and my Lord C. J. Holt (e), on another Occasion, declared himself of the same Opinion.

(a) 3 Bac. Abr. 495. 4 Bac. Abr. 516. Stra. 498. Cunningh. Rep. 94. Tri. at Ni. Pri. 9.

(b) Hob 253.

(c) 2 Inst. 592.

(d) 4 St. Tri. 394.

(e) 11 Mod. 99. pl. 7. It is said that Lord Chief Justice Holt always asked, "Can you prove this to be true?" If you write such Things as you are charged with, it lies upon you to prove them true, at your Peril; and, in my Opinion, a Man runs Risque enough in being forced to do this. Lord Chief Justice Pratt (Father of the present worthy Lord High Chancellor of Great Britain) declared that "the Truth of a Libel would be sufficient Cause to prevent the Interposition of the Court of King's Bench in the extraordinary Manner of Information, and induce them to leave it to the ordinary Course of Justice, before a Grand Jury. Stra. 498. 3 Bac. Abr. 492.

I shall

I shall now proceed to the Examination of the Reason assigned for this two-fold Resolution, to wit, *For in a settled State of Government the Party grieved ought to complain for every Injury done him in an ordinary Course of Law, and not by any Means to revenge himself, either by the odious Course of libelling, or otherwise.* This proposed Equivalent of the Pen and the Press will by no Means supply their Place; they are profitably employed upon the Nature and Foundation of human Government, the Excellence and Defects of their various Forms, the particular Constitution of the State of which the Author is a Member, with the Means of its Perfection and Preservation; and in Monarchies limited and tempered by Laws, in giving their best Assistance for clearly distinguishing and preserving the just Boundaries between the Prince's Prerogative and the People's Liberty, both being necessary to the common Good; in the Examination and Representation of the Nature and Condition of the several Parts of an extended Empire, and their mutual Interests and Relations, with the Relations of the whole to other Estates; in considering the Wisdom, Propriety, and Utility of Laws, or their Defects through Mistakes in their Formation, or the Mutability of human Affairs; and, as the Preservation of a free State greatly depends on the Manners and Customs of its Members, in pointing out to those who are willing to save their Country, and bless their Posterity, such Manners and Customs are beneficial or prejudicial to their Safety and lasting Happiness; in preventing the Abuses of Authority or Liberty, so that the former may not run into Power and Tyranny, or the latter into Licentiousness; and in promoting the Knowledge of Truth, the common Friend of all, with every thing that may tend to the Advancement of the common Weal; and, after examining, with Freedom, Propriety, and Care, public Measures, and the Merits or Demerits of public Persons, bringing all to the proper Test, that perpetual Law, which being made in Heaven cannot be repealed on Earth, *Salus Populi suprema Lex esto.*

The above Reason assigned for this twofold Resolution brings to my Mind the able, judicious, and unanswerable Arguments of that eminent, tho' most abused Frenchman, the Chevalier *D'Eon*, in Arrest of the intended (a) Judgment of the Court of *King's Bench*, for writing "*Lettres, Memoires, & Negociations particulieres du Chevalier D'Eon, Ministre Plénipotentiaire de France aupres du Roy de la Grande Bretagne; (a) avec M. M. les Ducs de Praslin, de Nevernois, de*

(a) The Defendant never appearing to receive Judgment, he was, in Consequence thereof, outlawed. See Dig. Lib. 88. in Notes.

Sainte-Foy, & Regnier *de Guerchy*, *Ambassadeur extraordinaire*, &c. &c. &c."

As I am satisfied I shall confer a Favour on the learned Reader, by laying before him so much of those Arguments as, in my Opinion, coincide so exactly with this Part of my Subject, I will therefore transcribe the Original, and also subscribe a Translation.

(a) For an Account of the Prosecution of the Author and Printer of this Book, see Dig. Lib. 87.

The Original.

Motifs que (b) Mr. LE CHEVALIER D'EON, devoit juger propres à annihiler la Sentence qu'on entend prononcer contre lui.

M. le Chevalier D'Eon, que le Comte de Guerchy avoit attaqué par des Imprimés tissus d'Horreurs, n'avoit d'autre Voie pour lui répondre que de faire imprimer pour sa Justification.

Suivant Hawkins, Livre I. Chapitre 73. S. 8. p. 194.

" La principale Intention de
" la Loi, quand elle a deffendu
" aux particuliers de chercher à
" se venger par des Libelles ou
" par quelque autre Maniere
" privée, a été de borner leur
" Envie de se rendre Juges dans
" leur propre Cause, & de les
" obliger à s'en rapporter, pour
" le Jugement de leurs Grieffs, à
" ceux que la Loi a établis pour
" en décider."

(b) Pieces autentiques pour servir au Proces criminel du Chevalier D'Eon, contre le Comte de Guerchy. P. 67. No. 111.

The Translation.

The CHEVALIER (b) D'EON's Reasons in Arrest of the intended Judgment against him.

The Chevalier D'Eon, whom the Count de Guerchy attacked in infamous Publications, had no other Means to resent the Affront, than by causing his Justification to be printed.

According to Mr. Serjeant Hawkins's Pleas of the Crown, B. 1. Chap. 73. Sect. 8. Fol. 194.

" The chief Intention of the
" Law in prohibiting Persons to
" revenge themselves by Libels,
" or any other private Manner,
" is to restrain them from endeavouring to make themselves
" their own Judges, and to oblige
" them to refer the Decision of
" their Grievances to those whom
" the Law has appointed to determine them."

(b) Authentic Memorials concerning the Chevalier D'Eon's criminal Prosecution against the Count de Guerchy.

Il suit de ce Principe,

The Consequence of this Principle is,

1. Qu'un Ecrit diffamatoire n'est criminel, qu'autant qu'il est fait au Mépris des Loix du País, parce qu'on néglige d'y avoir Recours, quoiqu'on le puisse.

1. That a defamatory Writing is not criminal, unless it be in Contempt of the Laws of the Country, in refusing to have Recourse to them, when in the Party's Power.

2. Qu'un Ecrit diffamatoire n'est criminel, qu'autant que la Loi offre des Juges en Etat de prononcer sur les Grieffs auxquels répond cet Ecrit diffamatoire.

2. That a defamatory Writing is not criminal, unless the Law hath appointed Judges capable of redressing the Grievances, of which the defamatory Writing complains.

De là il doit donc suivre.

Hence then it must follow,

Que si la Loi n'offre point de Juges capables de prononcer sur les dits Grieffs, l'Ecrit diffamatoire devient non seulement permis, mais même nécessaire aux Termes de ce Jurisconsulte.

That if the Law hath not appointed Judges capable of redressing the said Grievances, the defamatory Writing is not only lawful, but even necessary, in the Words of this Lawyer.

Or il est clair que telle est la Position du Chevalier D'Eon.

Such clearly then is the Position of the Chevalier D'Eon.

1. Le S. de Guerchy la attaqué par des Ecrits diffamatoires & publics : il doit s'en plaindre, dit la Loi Angloise : à qui ? demande sa Position ou celle de son Adversaire.

1. The Count de Guerchy attacked him in defamatory and public Writings : he ought to make his Complaint, says the Law of England. To whom ? Consult D'Eon's or de Guerchy's Position.

2. Celui qui l'attaque est Ambassadeur de France en Angleterre, & comme tel, prétend ne reconnoître aucun Tribunal dans la Nation où il réside : le Chevalier D'Eon ne voit donc aucun Juge en Etat de recevoir ses Plaintes & de prononcer sur ses Grieffs ; il ne peut donc s'adresser à aucun : & s'il fait un Ecrit,

2. The Person who attacks is Ambassador of France, in England, and as such acknowledges the Jurisdiction of no Court of Justice, in the Nation in which he resides : So that there is no Judge capable of hearing the Chevalier D'Eon's Complaints, and of redressing his Grievances ; he is deprived of all judicial Resort :

Ecrit, qu'on peut en quelque Façon nommer diffamatoire, ce n'est point au Mépris des Loix du País qui, impuissantes en sa Faveur, dans cette Action, doivent de même être impuissantes contre lui : *son Ecrit n'est donc point un Libelle, il n'est donc point criminel* : QUELLE SENTENCE PUIT-IL DONC REDOUTER DANS CE CAS ?

3. *La Presse devenoit donc sa seule Deffense contre la Presse ; & l'ECRIT D'IEFAMATOIRE MAIS VRAI, le seul Moïen qu'il eut de terrasser des ECRITS D'IEFAMATOIRES MAIS FAUX.*

4. Que le Chevalier D'Eon soit ou ne soit pas Ministre, trouvant, aux Termes d'*Hawkins*, dans le seul Caractere public du Comte de *Guerchy*, un Obstacle invincible à saisir quelque Tribunal que ce soit de ses Grieffs, pour en obtenir la Réparation. Il n'avoit que l'Impression pour, en suivant la Loi naturelle où manquoit la Loi positive, venger son Honneur offensé, rétablir son Caractere injurié, demasquer ses Ennemis & se redonner une Considération qui, aussi légitime, fait le Fondement & le Soutien de sa Fortune. *Il a donc pu, il a donc dû écrire, faire imprimer, & publier.*

5. Ce que rend criminel un Ecrit diffamatoire, c'est, suivant tous les Jurisconsultes anglois, "le Danger de l'Infraction de la Paix qui peut conduire à l'Effusion du Sang." Or, ici il y avoit fort peu de Danger qu'on en

sort : and if he composes a Writing, which may in some Measure be deemed defamatory, it is not in Contempt of the Laws of the Country, which, ineffectual in his Favor, in this Instance, ought to be equally so against him. *His Writing is no Libel*, it is no ways criminal: WHAT SENTENCE THEN NEED the Chevalier D'Eon APPREHEND ?

3. *The Press was his only Defence against the Press ; and the DEFAMATORY TRUE WRITING, the only means he had to detect the DEFAMATORY FALSE WRITING.*

4. The Chevalier D'Eon finding it impossible, according to *Hawkins*, from the public Character of Count de *Guerchy*, to possess any Court of Justice with his Grievances, so as to obtain Satisfaction, he was obliged to print, in Obedience to the Law of Nature, the positive Law being deficient, in order to revenge the Affront cast on his Honour, to retrieve his injured Character, and to discover his Enemies ; HE WAS AT LIBERTY, HE WAS OBLIGED TO PRINT AND PUBLISH.

5. What makes a defamatory Writing criminal, is, in the Opinion of all the *English* Lawyers, the Danger of a Breach of the Peace, which may occasion the shedding of Blood ; now in this Case there was very little Apprehension

en vint à cette Extrémité. Mais y en eut-il eu ? L'Homicide même n'est-il pas permis, quand il ne reste aucun autre Moïen de se deffendre ?

hension that the Parties would come to such Extremities—but suppose they had ; is not even Homicide justifiable when no other Means is left to defend one-self ?

The Judges fifth Resolution was, that (*a*) a Libel without Writing may be either by Pictures, as by painting the Party in a shameful or ignominious Posture, or it may be by Signs, as by fixing a Gallows or other scandalous and reproachful Sign, at the House of the Party, or elsewhere.

It is observable (*b*) that both the above *Dieta* are most clearly extrajudicial, and it is much doubted, whether there ever was such a Prosecution.

The last Resolution was, that (*c*) if one finds a Libel (and would keep oneself out of Danger) if it be composed against a private Man, the Finder may burn it, or presently deliver it to a Magistrate ; but if it concerns a Magistrate, or other public Person, the Finder ought presently to deliver it to a Magistrate, to the Intent that, by Examination and Industry, the Author may be found out and punished.

This (*d*) Rule may be said not only to be extrajudicial, but absolutely impossible to be carried into Execution ; the civil Law taking Place before the Invention of Printing, made it at that Time practicable : no one who was ever in a Coffee-House will suppose it to be so at present.

Thus (*e*) the general Rules laid down by the Judges in this Case, in order to suppress the growing Evil of Libelling, appear, most of them at least, either to be extrajudicial, or not to be maintained.

The (*f*) Reason of this, and the other Absurdities contained in the Case, arises from every one of these Rules being borrowed from the civil Law.

I should conceive that the Doctrine insisted upon in this Case, had alarmed the famous Dr. *Donne*, who was then Dean of St. *Paul's*, as from a Letter of his written at that Time, I have copied

(*a*) 5 Rep. 125. b.

(*b*) Bar. Observ. 72.

(*c*) 5 Rep. 125. b.

(*d*) Bar. Observ. 73.

(*e*) Bar. Observ. 72.

(*f*) Bar. Observ. 73.

the following Passage : " There (a) be many Cafes where a Man may " do his Country (b) Good and Service by Libelling ; for where a " Man is either too great, or his Vices too general, to be brought " under a judiciary Accufation, there is no Way but the extraor- " dinary Method of Accufation, and I have heard that nothing hath " foupled the Duke of *Larma* fo much, as the frequent Libels made " upon him ; *sealed Letters in the Star-Chamber* have now-a-days " been judged Libels."

It may be further obferved, that Lord *Coke* was Attorney General, when the Points in this Cafe were adjudged ; that it does not appear by what Members of the Court of *Star-Chamber* the Refolutions contained in this Cafe were made, Judgment being given according to the Majority of Voices.

It is not improbable, that the Bifhop was influenced by the *civil* Law, which fo far governed in his own Court, and he might influence others. Archbishop *Laud*, who was frequently lefs referved in declaring his Opinion, or his Reasons, than fome of his Brethren, when Judgment was given againft *Bastwick*, *Burton*, and *Prynne*, on which Occafion he was the chief Speaker, obferved, that the Punifhment of Libels was in fome Cafes capital by the *imperial* Laws.

No Precedent, or Authority at common Law, faving the fingle Passage in (c) *Bracton*, which is evidently taken from *Justinian's* (d) *Institutes*, is cited to warrant the Refolutions made in the above Cafe ; and if thefe Judges were influenced by the *civil* Law informing them, it cannot reasonably be expected that they fhould exprefsly acknowledge fuch Influence at the Time when they refolved, that their fellow Subjects cenfuring their Conduct, or that of others, fhould become liable to fo fevere Penalties, as in fome Cafes to be difmembered for it, whereby they feem to have inclined to the Severity of the *imperial* Laws as far as their Power would permit, capital Offences (e) not being within their Cognizance.

This *Star-Chamber* Cafe hath been from Time to Time, before and fince the Revolution, quoted and relied upon by the Crown Lawyers, and Reference made to it, as a primary Authority, by sub-

(a) Doctor *Donne's* Letters. 4to. P. 92. Bar. Obferv. on Stat. 73. in Notes.

(b) The learned *Selden* fays, " more folid Things do not fhew the Complexion of the Times " fo well as Libels." Table Talk. 3 *Seld.* 2042. a forbidding Writing (fays Lord *Bacon*) is thought to be a certain Spark of Truth, that flies up in the Face of them, who feek to tread it out.

(c) *Fit autem Injuria, non folum cum quis Pugno percuffus fuerit, verberatus, vulneratus, feu Fustibus caesus ; verum cum ei Convitium dictum fuerit ; vel de eo factum Carmen famosum.* *Bract.* Lib. 3. Cap. 36. Sect. 1. Fol. 155.

(d) *Justin.* Lib. 4. Tit. 4. Sect. 1.

(e) 4 *Inst.* 66. 3 Lord *Bac.* 35. S. P.

sequent Reporters, and the principal Resolutions it contains delivered for Law by other Authors, one of whom says, " This (a) Case contains the best System of the Doctrine of Libels, that is to be found, and one would think it so full and plain as that all future Doubts that could arise in this Learning might be settled and expounded by it."

Notwithstanding (b) the Observations which I have here taken the Liberty to make on this very extraordinary Case, I cannot conclude them without expressing my Detestation of Libels, which cannot be too much discouraged in a well regulated Government, nor is such Restraint wanting by the common Law, though the Principles laid down in this *Star-Chamber* Decision be not resorted to.

The immortal *Sidney* hath an excellent Observation on the Cases and Proceedings of the Court of *Star-Chamber*; they only prove (says (c) he) that some Kings have encroached upon the Rights of the Nation, and been suffered till their Excesses growing to be extreme, they turned to the Ruin of the Ministers who advised them, and sometimes of the Kings themselves.

Sir *Henry Yelverton* exhibited (d) an *Information* in the *Star-Chamber*, against one *Wrennum*, *Ore tenus*, because he had divers Times petitioned the King against Sir *Francis Bacon* Lord Chancellor, pretending that the said Lord *Bacon* had done great Injustice to him, in granting an Injunction, and awarding Possession of Land against him, for which he had two Decrees in the Time of the former Chancellor: and also he made a Book of all the Proceedings in the said Cause between him and one *Fisher*, and dedicated and delivered it to the King, in which he notoriously traduced and scandalized the said Chancellor, saying, that for this unjust Decree, he, his Wife, and Children were murdered, and by the worst Kind of Death, by starving; and that now he having done unjustly, he must maintain it by speaking Untruths, and that he must use his Authority, Wit, Art, and Eloquence, for the better Maintenance thereof, with other such like scandalous Words.

It is observable that the Proceeding in this Case was an *Information*, though the Complaint was made in the *Star-Chamber*, and though it was made by the first Man in the Kingdom, even *then* in Point of Interest, and *always* the greatest Ornament of his Age and Nation for literary Abilities.

(a) State Law. 57.

(b) Bar. Observ. 73.

(c) Sid. on Gov. Chap. 3. Sect. 27. P. 378.

(d) Popb. 135.

One *Jeffs* was (a) *indicted* for exhibiting an infamous Libel directed to the King against *Coke* late Chief Justice of the *King's Bench*, and the Court, for a Judgment given in the said Court in *Magdalen* (b) College Case, affirming the said Judgment to be Treason, and calling the Chief Justice Traitor, perjured Judge, and scandalizing all the Professors of the Law: and this Libel he fixed upon the great Gate entering *Westminster-Hall*, and divers other Places, and being arraigned he put in a scandalous Plea.

It may be observed, that though this was a Libel on the whole Court of *King's Bench*; that though the Defendant prayed Counsel, who were accordingly assigned him by the Court, though he refused to plead as they advised him, though he put in a scandalous Plea, and insisted to abide by it, and could not be prevailed on to plead otherwise, yet it does not appear that he was proceeded against by *Attachment*, but it does appear that he was *indicted*.

Norton, Lee, May, Hingate, Smith, Diggs, Winston, Harper, Ashley, Serjeant at Law, were all proceeded against for scandalizing Lord Keeper (c) *Coventry*, by Letters and Memorials, in which, calling him by the Name of Sir J. K. they term him an unjust Judge, and a Decree made by him an unjust Judgment, and accuse him of Bribery and Corruption, &c. and present a Petition to the King to that Effect, &c.

Though every Kind of Punishment that was ever inflicted on Libellers was inflicted on the above Offenders, viz. Commitment; Fine; Acknowledgment of Offence; Paper; Submission; riding with Face to Horse's Tail; Pillory; Ears nailed; Imprisonment for Life; Damages; the Serjeant at Law not to practice till Submission; yet the Proceedings were not by Way of *Attachment*.

One *Thomas* (d) *Harrison* (e) was *indicted*, for that, the Court of *Common Bench*, *King's Bench*, and *Chancery* sitting, he rushed to the Bar of the *Common Bench*, and in Disturbance of the Justices, and of the Court, and Administration of Justice, and against the King, and his royal Majesty, openly, publicly, and maliciously, intending to draw Justice *Hutton*, one of the Justices of the *Common Bench*, into Displeasure of the King, and of other his Subjects, and to bring him into Danger of his Life, and Forfeiture of his Goods, spake these Words of him, the said Justice *Hutton*, in the Presence and Audience

(a) *Cro. Car.* 175. pl. 21.

(b) 11 Rep. 66. b. *Rel. Rep.* 151. pl. 1. 2 *Bulstr.* 146.

(c) *Dig. Lib.* 111. 112.

(d) He was a Batchelor of Divinity, and Parson of *Creak*, in *Northamptonshire*. *Hut.* 131. *St. Tri.* 720.

(e) *Cro. Car.* 503. pl. 5.

of the Justices there sitting, and (a) giving Rules and Orders, "I accuse Mr. Justice Hutton of High Treason," for which he was committed to the Custody of the Warden of the Fleet, by Justice Crawley; and after by the Direction of the King, being (b) hereof indicted, pleaded Not guilty, and by a Jury of Knights and Esquires was found guilty; he confessing that he spoke these Words purposely and openly, because Judge Hutton in his Argument in the Exchequer Chamber (c) 28 Apr. 14 Car. in the Case adjourned to B. R. upon a Scire Facias, by the King, against Hampden, for Ship Money, in which he was of Opinion, that as well for the Matter as for the Form, upon divers Exceptions to the Pleading, that (d) the King might not charge his Subjects to find Ships, and that therein he denied his Supremacy; and also that by this Means he stirred up the Subjects to Sedition against the King; and the Court said that this was an Offence to every (e) Court.

Upon this Case of Thomas Harrison, it may be observed, that the Defendant could not be guilty of a greater Contempt of the Justice of the Nation, than to accuse a Judge openly in Court of High Treason, for having given Judgment against the King in his favorite Scheme of Ship Money, yet you see he was only committed, as is usual in ordinary Cases, and afterwards indicted and tried by a Jury.

John Lilburne, close Prisoner in the Fleet, on 7th Nov. 1640, presented his Petition to the House of Commons, complaining of the Proceedings against him in the Star-Chamber, in February 1637-8, for unlawfully printing and publishing of libellous and seditious Books, intituled, "News from Ipswich, &c." contrary to a Decree of that Court made in July preceding, to prohibit the printing of Books without License, to this Effect:

"That (f) none shall presume to print any Book or Pamphlet
 "whatsoever, unless the same be first licensed, with all the Titles,
 "Epistles and Prefaces therewith imprinted, by the Lord Archbishop
 "of Canterbury, or the Bishop of London, for the Time being, or by
 "their Appointment; and within the Limits of either University,
 "by the Chancellor, or Vice-Chancellor thereof; upon Pain that
 "every Printer so offending shall for ever thereafter be disabled to

(a) Hut. 131.

(b) Cro Car. 503. pl. 3.

(c) Hut. 131.

(d) Cro. Car. 504.

(e) St. Tri. 722. Cro Car. 504.

(f) Rusbw. Collect. Part II. Vol. I. P. 463.

“ exercise the Art of Printing, and shall suffer such further Punish-
 “ ment as by this Court, or the High-Commission, shall be thought
 “ fitting; that before any Books imported from foreign Parts shall
 “ be exposed to Sale, a true Catalogue thereof shall be presented to
 “ the Archbishop of *Canterbury*, or the Bishop of *London*: and that
 “ no Officers of the Custom shall deliver any foreign Books out of
 “ their Hands and Custody, before those Bishops shall have appointed
 “ one of their Chaplains, or some other learned Man, with the Ma-
 “ ster and Wardens of the Company of Stationers, or one of them,
 “ to be present at the Opening of the Pack and Fardels, and to view
 “ the same. And those that disobey this Injunction are to be cen-
 “ sured in this or the high Commission Court, as the several Causes
 “ shall require. And if in this Search there happen to be found
 “ any schismatical or offensive Books, they shall be brought to the
 “ aforesaid Bishops, or the High-Commission Office, that the Of-
 “ fenders may be punished. That no Person whatsoever shall im-
 “ print in the Parts beyond the Sea, or import from thence, any
 “ *English* Books, or whereof the greater Part is *English*, whether
 “ formerly printed or not. And that no Books whatsoever shall be
 “ re-printed, though formerly licensed, without a new License first
 “ obtained, upon Pain of like Censure and Punishment. And that
 “ if any Person whatsoever, that is not an allowed Printer, shall
 “ presume to set up a Press for printing, or work at any such Press,
 “ or set and compose Letters for the same, he shall be set in the
 “ Pillory, and whipped through the City of *London* (a).”

Upon this Prosecution *Lilburne* was ordered to be examined, upon
Interrogatories, touching the Matters charged upon him; and being
 brought up to the Office for Examination, he refused to take an Oath
 to answer *Interrogatories*, saying, it was an Oath *ex Officio*, and that
 no free-born Englishman ought to take it, not being bound by the
 Law to accuse (b) himself. And afterwards upon the 9th of *Febru-*
ary, peremptorily refusing to take the Oath tendered to him in open
 Court, he was remanded to the *Fleet*, to remain close Prisoner until
 he should take his Oath, and be examined. And it was by the
 Court declared, that unless he should submit to take the Oath, and
 be examined, by a certain appointed Time, their Lordships would, on
 the last Sitting of the Term, proceed to censure him for his Con-
 tempt. And on the 13th of the same Month appearing again in
 Court, the Attorney (c) General informed their Lordships that he

(a) 4 *Rush. Collect.* 463. 464.

(b) 3 *Bulstr.* 50.

(c) Sir *John Banks*, Knight.

had obstinately continued his Refusal, and moved them to pass Sentence upon him for his Contempt, whereupon their Lordships endeavoured to persuade him to conform, offering then to accept his Oath without proceeding to Censure; but still persisting in his Refusal to take the Oath proposed, "the whole Court did, with unanimous Consent, declare and adjudge the said *Lilburne* guilty of a very high Contempt and Offence, of dangerous Consequence and evil Example, and worthy to undergo a very sharp, severe and exemplary Censure, which might deter others from the like presumptuous Boldness in refusing to take a legal Oath, without which many great and exorbitant Offences, to the Prejudice and Danger of his Majesty, his Kingdoms and loving Subjects, might go away undiscovered and unpunished." And therefore their Lordships decreed that he should be remanded to the *Fleet*, there to remain till he should obey the Orders of the Court, and pay a Fine of 500*l.* to his Majesty's Use; and before his Enlargement to become bound with good Sureties for his good Behaviour; and the more to deter others from offending in the like kind, they further decreed that he should be whipped from the Prison of the *Fleet* to the Pillory, to be erected when and where they should direct; and that he should be set in the Pillory, and from thence be returned to the *Fleet*, there to remain according to their Decree.

On the 18th of *April* following, in Execution of this Sentence, he was severely whipped from the *Fleet* to *Westminster*: During his Whipping and standing in the Pillory he uttered many bold Speeches against the Tyranny of Bishops, &c. and when his Head was in the Hole of the Pillory, he scattered among the People sundry Copies of Pamphlets, (said to be seditious) of which the Court of *Star-Chamber*, (then sitting, being informed) immediately ordered him to be gagged during the Residue of the Time appointed for his standing in the Pillory, which was accordingly done; upon which he stamped with his Feet, thereby intimating to the Beholders, as *Rushworth* (a) supposes, he would still speak were his Mouth at Liberty; and on the same Day the Court of *Star-Chamber* made the following Order: "Whereas *John Lilburne*, Prisoner in the *Fleet*, by Sentence in the *Star-Chamber*, did this Day suffer condign Punishment for his several Offences, by whipping at a Cart, and standing in the Pillory, and (as their Lordships were this Day informed) during the Time that his Body was under the said Execution, audaciously and wickedly, not only uttered sundry scandalous and

(a) *Rushw. Collect.* Part II. Vol. I. P. 466.

" seditious

“ seditious Speeches, but likewise scattered sundry Copies of seditious Books amongst the People that beheld the said Execution, for which very thing, amongst other Offences of like Nature, he had been censured in the said Court by the aforesaid Sentence. It was thereupon ordered by their Lordships, that the said *Lilburne* should be laid alone with Irons on his Hands and Legs in the Wards of the *Fleet*, where the basest and meanest Sort of Prisoners are used to be put, and that the Warden of the *Fleet* take special Care to hinder the Resort of any Person whatsoever unto him, and particularly that he be not supplied with any Hand, and that he take special Notice of all Letters, Writings and Books brought unto him, and seize and deliver the same unto their Lordships; and take Notice from Time to Time who they be that resort to the said Prison to visit the said *Lilburne*, or to speak with him, and inform the Board (a).” And on that Day their Lordships made this further Order.

“ That his Majesty’s Attorney and Solicitor General be hereby prayed and required to take strict Examination of *John Lilburne*, Prisoner in the *Fleet*, touching the Demeanour and Speeches of him the said *Lilburne* during the Time of his Whipping and standing in the Pillory this day, according to Sentence of his Majesty’s Court of *Star-Chamber*, particularly, whether the said *Lilburne* did at that Time utter any Speeches tending to Sedition, or to the Dishonour of the said Court of *Star-Chamber*, or any Member of the said Court? and whether he did throw about and disperse at the same Time any seditious Pamphlets and Books, either of that Sort for which he was formerly censured, or any other of the like Nature? what the Speeches were and who heard them? what the said Books were, and whence, and of whom the said *Lilburne* had them? and what other material Circumstances they should think fit to examine either the said *Lilburne* upon, or any other Person by whom they shall think good to inform themselves for the better finding out the Truth: and thereupon to make Certificate to the Board what they find, together with their Opinions (b).”

Lilburne having for some Time lain with double Irons on his Hands and Feet in the inner Wards of the Prison, a Fire happened near the Place in which he was close confined, which gave a Jealousy that in his Fury and Anguish of Pain he was desperate, and had set

(a) *Rushw. Collect.* Part II. Vol. I. P. 466. 467.

(b) *Rushw. Collect.* Part II. Vol. I. P. 467.

the Prison on Fire, not regarding himself to be burnt with it: the neighbouring Inhabitants without the *Fleet*, and the Prisoners within all cried, *release Lilburne, or we shall all be burnt*; whereupon they run headlong, and made the Warden remove him out of his Hold, and the Fire was quenched, and he remained a Prisoner where he had some more Air. He continued in Prison to the Time of presenting his Petition, when it was ordered, "That he should have Liberty by Warrant of this House, to go abroad in safe Custody, to prosecute his Petition exhibited here, and that he be removed out of the Common Prison where now he is, into some more convenient Place, and have the Liberty of the *Fleet* (a)."

The House of Commons conceiving *John Lilburne's* Case proper for the Consideration of the House of Lords, they transmitted the same to their Lordships, who, after all proper Proceedings, made the following Order thereupon.

"Whereas the Cause of *John Lilburne*, Gent. came this Day to a Hearing at the Bar, by his Counsel, being transmitted from the *House of Commons*, concerning a Sentence pronounced against him in the *Star-Chamber* Feb. 17th Anno 13 Car. Regis; and after an Examination of the whole Proceedings, and a due Consideration of the said Sentence, it is this Day adjudged, ordered, and determined by the Lords in Parliament assembled, that the said Sentence, and all Proceedings thereupon, shall forthwith be for ever totally vacated, obliterated, and taken off the File in all Courts where they are yet remaining, as illegal, and most unjust, against the Liberty of the Subject, and the Law of the Land, and *Magna Charta*, and unfit to continue upon Record; and that the said *Lilburne* shall be for ever absolutely freed, and totally discharged from the said Sentence, and all Proceedings thereupon, as fully and amply as though never any such Thing had been; and that all *Extreates* and *Process* in the Court of *Exchequer* for levying of any Fine (if any such be) shall be wholly cancelled and made void, any thing to the contrary in any wise notwithstanding."

John Brown, Cler. Parliament (b).

On the 4th of May 1641, Mr. Rouse reported the Case of *John Lilburne*, whereupon it was,

"1. Resolved, that the Sentence in the *Star-Chamber* given against *John Lilburne* is illegal, and against the Liberty of the Subject, and also bloody, wicked, cruel and tyrannical."

(a) 4 *Rushw. Collect.* 20.

(b) *Rushw. Collect.* Part II. Vol. I. P. 469.

2. "Resolved,

" 2. Resolved, that Reparation ought to be given to Mr. *Lilburne* " for his Imprisonment, Suffering, and Losses, sustained by that " illegal Sentence (a)."

Information (b) in the *Queen's Bench*, not an Attachment in *Chancery*, for a Libel called " The Country Parson's Advice to my Lord " Keeper *Cowper*."

Lieutenant (c) *Frye* recovered 1000*l.* Damages against Sir *Chaloner Ogle* for the Sentence passed against him by a Court Martial, in the *West Indies*, whereof Sir *Chaloner* was President, and was at Liberty to bring his Action against every Member of the said Court; accordingly he took out a Writ from the Court of *Common Pleas*, and Rear Admiral *Mayne*, President of the Court Martial, which set daily at *Deptford*, was arrested coming from the Court.

The President and Members of the Court Martial signed a scandalous Libel, which grossly and publicly reflected on that most worthy and upright Magistrate the Lord Chief Justice (d) *Willes*, which they sent by Way of Letter to Mr. *Corbet*, then Secretary to the Admiralty; the Libel was to the following *Purport*:

First (e). It appears to us, that Sir *John Willes*, Knt. Lord Chief Justice of the *Common Pleas*, having no Regard to the Honour and Safety of his Majesty, the Security of the Liberties and Properties of his Subjects, the Support of the Constitution, or Defence of his Dominions, in Time of actual War with two powerful Nations, favoured, aided and abetted, by Rebellion at Home, contrary to his Duty and Trust, and in Violation of the Statute Laws of the Realm, as well as those established by Use and Custom, Time immemorial, by which his Majesty's Arms by Sea have been prudently, wisely and effectually governed, to the great Glory of his Majesty, and Protection of his Subjects; as well as in open Defiance of his Majesty's Commands, in Consequence of an Address from the Honourable House of Commons in Parliament assembled, the said Lord Chief Justice *Willes* did issue his Writ on the 12th Day of *May*, in the 19th Year of his present Majesty's Reign, to (f) arrest, seize and secure the Persons of *Perry Mayne*, Esquire, and *James Rentone*, Esquire, Members constituent, and Judges of the Court Marshal then

(a) 4 *Rushw.* Collect. 250.

(b) 11 *Mod.* 86. pl. 5.

(c) *Dig. Lib.* 132.

(d) Father of *Edward Willes*, Esquire, one of the present patriotic Judges of the Court of *King's Bench*.

(e) *Dig. Lib.* 134.

(f) The Absurdity occasioned by the Court Martial's confounding an *Arrest* with a mere *Service* of Process is too obvious to need other Notice. *Dig. Lib.* 134. in Notes.

fitting,

sitting, by Orders of the Lords Commissioners for executing the Office of Lord High Admiral of *Great Britain*, and by Virtue of the Power to them given by the Statute of 13 Car. 2. c. 9. the said Judges being duly qualified as the Act requires; and did cause the said Writ to be (a) served on the said *Perry Mayne*, Esquire; by which Craft and subtle Device, as far as in him layeth, he did let, respit, and disturb, the Laws of the Land, and by forcibly taking away Judges, prevent the Execution of Justice, and elude the Commands of his Majesty, grounded upon the Address of the Honourable House of Commons in Parliament assembled; and though in a Clause subjoined to the said Writ, it was artfully added, that the President is served with this Process, to the Intent that he may, by his Attorney, appear in his Majesty's Court of *Common Pleas*, it appears to us that this Evasion is only provided to the Intent that we might, possibly, through Over-sight, proceed in our judicial Capacity; and that by some reserved Device, as well our general Proceedings as our final Determination and Sentence, might be interpreted and declared invalid, void, and of none Effect, to the entire defeating of this solemn, grand, and national Enquiry.

Secondly, that the Grounds for this Writ was an Action recommended by the said Lord Chief Justice in open Court, for Damages against the said *Perry Mayne*, Esquire, and *James Rentone*, Esquire, for the Sentence of a Court Martial legally held, by Virtue of the Statute Laws of this Realm at *Jamaica*, of which Court the said *Perry Mayne*, Esquire, and *James Rentone*, Esquire, were Members constituents, or Judges, properly qualified as such by the known Laws of the Realm, as well Statutes as Use and Custom.

Thirdly, that in Consequence of the said Breach and Violation of the Laws of the Kingdom, as well as the Insult to a supreme Court of Judicature, fitting to determine in the derniere Resort, which by its Constitution never acknowledged any superior Court, nor any Appeal from its Sentence, but to his Majesty's Prerogative, as far as in him lieth, the whole Order, Discipline, and Government, of his Majesty's Armies by Sea is entirely and absolutely dissolved, and the Statute of 13 Car. 2. c. 9. made null and void; by which most wicked Device, the Honour of his Majesty is betrayed, the Security of his Subjects is exposed, and the fundamental Laws of the Constitution subverted.

In the *London Gazette* (b) of 15 Nov. 1745-6, appeared the following Paper signed by Admiral *Mayne*, Admiral *Byng*, and the se-

(a) The Absurdity occasioned by the Court Martial's confounding an *Arrest* with a mere *Service* of Process is too obvious to need other Notice. Dig. Lib. 134. in Notes.

(b) Dig. Lib. 135.

veral Commanders whose Names are subscribed thereto, and which was sent by them to the Right Honourable the Lord Chief Justice *Willes*.

"As nothing is more becoming a Gentleman than to acknowledge himself to be in the wrong, as soon as he is sensible he is so, and to be ready to make Satisfaction to any Person he has injured; we therefore, whose Names are underwritten, being thoroughly convinced, that we were entirely mistaken in the Opinion we had conceived of the Lord Chief Justice *Willes*, think ourselves obliged, in Honour as well as Justice, to make him Satisfaction as far as it is in our Power. And as the Injury we did him was of a public Nature, we in this public Manner declare, that we are now satisfied that the Reflections cast upon him in our Resolutions, were unjust, unwarrantable, and without any Foundation whatsoever; and do ask Pardon of his Lordship, and the Court of *Common Pleas*, for the Indignity offered both to him and the Court.

<i>P. Mayne,</i>	<i>C. Molloy,</i>
<i>J. (a) Byng,</i>	<i>Smith Callis,</i>
<i>E. Legge,</i>	<i>R. Erskine,</i>
<i>Ja. Rentone,</i>	<i>J. Pittman,</i>
<i>Tho. Frankland,</i>	<i>Char. Catford,</i>
<i>Cha. Colby,</i>	<i>Tho. Hanway,</i>
<i>J. Hamilton,</i>	<i>E. Spragge,</i>
<i>Sheldrake Laton,</i>	<i>John Orme."</i>
<i>Jos. Hamar,</i>	

When this Recantation was presented to the Lord Chief Justice, he spoke to the following Effect:

Although the Injury I have received might have required a private (b) Satisfaction, yet as the Offence was of a public Nature, and offered to the whole Court of *Common Pleas*, as well as myself, I thought it more consistent with my Character, and the Dignity of the Post I have the Honour to fill, to have Satisfaction in this public Manner, and desire, with the Concurrence of my Brothers, that it may be registered in the Remembrance Office, as a Memorial to the present and future Ages, that whoever are above the Law, will in

(a) This unhappy Gentleman was remarkable for *Error in Judgment*. Dig. Lib. 136. in Notes.

(b) It is said the Chief Justice determined to bring an Action against every Member of the Court Martial for the above Resolutions, and for that Purpose had himself drawn a Declaration, wherein he laid his Damages to 20,000*l.* and that it was with the utmost Difficulty that the first Interest of the Kingdom could prevail on his Lordship to drop the Prosecution. Dig. Lib. 136. in Notes.

the End find themselves mistaken; for we may with Propriety say of the Law, as of Truth, *Magna est, & prævalebit* (a).

When the many aggravating Circumstances of this Libel are duly considered, I do not think it possible to conceive one more virulent, more infamous, more insolent, more ridiculous, or more nonsensical.

The Resolutions charge a Chief Justice, eminent for his Abilities and Integrity, in the Execution of his Office, who was then living, with *having no Regard to the Honour or Safety of his Majesty, the Security of the Liberties or Properties of his Subjects, or the Support of the Constitution, and that contrary to his Duty and Trust, he issued his [not the King's] Writ to arrest the Members and Judges of the Court Martial then sitting; and did cause the said Writ to be served, by which Craft and subtle Device, as far as in him laid, he did disturb the Laws of the Land, and by forcibly taking away Judges, prevent the Execution of Justice.*

The Court Martial's Construction of the Notice to appear, at the Foot of the Process, is truly farfical, besides, that it is a *Felo de se* of the Court Martial's second wise Resolution; for the first Resolution says, *that by some reserved Device, (in the Notice to appear) as well their general Proceedings, as their final Determination and Sentence, were to be interpreted and declared invalid, void, and of none Effect.* Whereas in their third famous Resolution, they declare the Chief Justice's Proceedings to be an *Insult to their supreme Court of Judicature, sitting to determine in the dernier Resort, which, by its Constitution, never acknowledged any superior Court, nor any Appeal from its Sentence, but to his Majesty's Prerogative.*

As a Court Martial is a superior Court (in the Opinion of these naval Commanders) to the Court of Common Pleas, how could the latter annul the Proceedings of the former? How could the Proceedings of an inferior Court render invalid those of a superior Court?

These memorable Resolutions conclude, “*by which most wicked Device, the Honour of his Majesty is betrayed, the Security of his Subjects is exposed, and the fundamental Laws of the Constitution subverted.*”

This most extraordinary Libel is more extraordinary still, when we recollect that it was drawn up by Persons of the first Families and Fortunes in the Kingdom; yet a Submission satisfied the Chief Justice and the Rest of the honourable Judges of the Court of Common Pleas; a Submission only I say was accepted of, though the Libel was esteemed a national Affair; no Process of Attachment was ever threatened, or

(a) 2 Inst. 618.

even intimated. And let it never be forgot, that the *Recantation* of the Court Martial was registered in the Remembrance Office, as a Memorial to the present and future Ages, that *whoever is above the Law will, in the End, find themselves mistaken.*

Rule (a) *nisi Causa* for an Attachment of Contempt was granted by the Court of Common Pleas, against John Wilkie for publishing, "The Moderator," in which the Argument of Lord Ch. Just. (b) Pratt, in delivering the Opinion of that Court, on their discharging John Wilkes Esquire, from his Commitment in the Tower, was censured as precipitate, inconsiderate, injudicious, and erroneous: but this Rule was never made absolute.

A like Rule was granted against (c) Almon for publishing a Libel on the Right Honourable William Lord Mansfield, Lord Ch. Just. of the Court of King's Bench, in a certain Pamphlet, intituled "An Inquiry into the Doctrine, lately propagated, concerning Libels, Warrants, and the Seizure of Papers, with a View to some late Proceedings, and the Defence of them by the Majority, upon the Principles of Law and the Constitution, in a Letter to Mr. Almon from the Father of Candor (d)."

Mr. Serjeant Glyn, and Mr. (e) Dunning shewed (f) Cause for the Defendant Almon; whereupon the Judges took Time to consider of, and to deliver their Opinions on this Matter, which Opinions they have not been pleased to deliver even to this Day, so that the Decision of this important Point remains still *sub Judice*; and as this was a criminal Prosecution, *nullum Tempus occurrit Regi*; so that Mr. Almon may be put in Mind of his Publication a dozen Years hence.

If no Attachment was applied for against an Attorney (g), for charging the Chief Justice of King Edward the Second, and the Rest of the Justices of the Court of King's Bench, in a Letter to a Privy Counsellor, with Breach of their Duty.

If no Attachment was applied for against a Suitor (h) of the Court of Chancery, for divers Times petitioning King James the First, and accusing Lord Chancellor Bacon of Injustice, in a Book

(a) Dig. Lib. 137. 139.

(b) Now Lord Chanc. Camden.

(c) Dig. Lib. 137.

(d) The Title of this Pamphlet does not seem to be truly set out in Dig. Lib. but as the Pamphlet was several Times printed, the Variance may be owing to that Circumstance.

(e) Now Solicitor General.

(f) The Substance of the Counsel's Arguments on shewing Cause may be seen in Dig. Lib. 137. &c.

(g) See John de Northampton's Case. P. 15.

(h) See Wrennum's Case. P. 25.

dedicated and delivered to the King, in which he notoriously traduced and scandalized the said Chancellor.

If *no Attachment* was applied for against a Person (*a*), for exhibiting an infamous Libel directed to King *Charles the First*, reflecting on Lord Ch. Just. *Coke*, and the Court of *King's Bench*, affirming that a Judgment given in the said Court was Treason, and calling the Chief Justice Traytor, and perjured Judge, and scandalizing all the Profession of the Law, wherein the Defendant refused to plead, as the Counsel assigned by the Court, at his own Request advised, but put in a scandalous Plea, and could not be prevailed on to plead otherwise, but insisted to abide by it.

If *no Attachment* was applied for, even against a *Serjeant (b) at Law*, for scandalizing Lord Keeper *Coventry*, by Letters and Memorials, calling him and his Decrees unjust, and accusing him of Bribery and Corruption, in a Petition to the King.

If *no Attachment* was applied for, for personally (*c*) charging a Judge in open Court with High Treason, for his *Integrity* in giving Judgment against King *Charles the First*, in the *unconstitutional* Case of Ship Money.

If *no Attachment* was moved for, against a Doctor (*d*) of Divinity, for writing a Libel on Lord Keeper *Cowper*.

If *no Attachment* was desired against a Court (*e*) Martial, who had resolved under their respective Hands, that that able and upright Judge, the late Lord Ch. Just. *Willes*, was a Traitor to his King and Country, and also a Subvertor of the fundamental Laws of the Constitution.

If *no Attachment* was granted for censuring (*f*) the Opinion of the Court of *Common Pleas*.

If *no Attachment* was granted, for publishing (*g*) a Libel on the present Lord Ch. Justice of the Court of *King's Bench*.

If *no Attachment* hath been applied for, or, if applied for, granted, or, if granted, adjudged, on parliamentary (*h*) Inquiry, illegal, and against the Liberty of the Subject, if, I say, that unconstitutional Proceeding hath been denied in so many Instances of gross Libels

(a) See *Jeff's Case*. P. 26.

(b) See *Serjeant Ashley's Case*. P. 26.

(c) See *Harrison's Case*. P. 26.

(d) See *Doctor Brown's Case*. P. 32.

(e) See the Court Martial's Case. P. 32.

(f) See *Wilkie's Case*. P. 36.

(g) See *Almon's Case*. P. 36. and Dig. Lib. 139.

(h) See *Lilburne's Case*. P. 27.

as above stated, on Lords Chancellors, Lords Chief Justices, and other Judges, in the several Reigns of K. K. *Edward the Second, James the First, Charles the First, Queen Anne, King George the Second and Third*; it is to be presumed, that the *ninth* Year of the Reign of His present Majesty, will not be the chosen *Æra* for such Prosecutions, against the Authors, Printers or Publishers of contemptuous Writings, be they on Judges or on Courts of Justice.

I do not find that Lord *Hale*, though he hath so amply treated of the Crown Law, hath writ a Syllable concerning Attachments of Contempt, and Mr. Serjeant *Hawkins* hath contented himself, as to Attachments for contemptuous Writings, with the following Passage:—

“It seems (a) *needless* to put any Instance of Persons being punished by Attachment, for contemptuous Words or Writings, concerning the Court, which are generally so obvious to common Understanding, and therefore *sometimes* Attachments have been granted for contemptuous Words, concerning the Rules of Court.”

It is observable, that the learned Serjeant hath not cited one single Authority to support this extraordinary Passage of his Book; an Omission he is seldom guilty of, and indeed from the Collection of Cases we have been able to make, (the Search after which hath cost us some Time as well as Pains,) we own that the Instances of Persons being proceeded against by Attachment, for contemptuous Words or Writings on Courts of Justice, or the Judges thereof, are not so *general*, as to be *obvious* to our common Understanding; nor do they seem to have been so to the worthy Serjeant's, for we presume he hath not been able to find any, otherwise we are satisfied, his Labor and Industry would have discovered them; and it seems as remarkable, that he should make Use of so doubtful an Expression, as that “*sometimes* Attachments have been granted for contemptuous Words, spoken of the Rules of the Court,” when such Proceedings in such Cases of Contempt, seem to be established by an immemorial and uninterrupted Course of the respective superior Courts of Justice in *Westminster-Hall*.

Coler in his Decisions most learnedly maintains, that Custom defends from all Guilt the mere Venders of Libels, unless *Dolus malus et Animus injuriandi*, that is to say, *express Malice and a Design to offend*, be proved. His Words are, “It was found, that Stationers

(a) 2 *Hawk.* Pl. Cr. 155. Chap. 22. Sect. 36.

“ [Bookfellers]

“ [Bookfellers] were absolved, though they had sold infamous Libels, “ because all Stationers [Bookfellers] use to sell such (a).”

Judge *Powell*, in the (b) Trial of the seven Bishops, speaking of their Petition, which was charged as a Libel in the Information, said, “ To make it a Libel, it must be false and malicious, and tend “ to Sedition;” and declared, “ As he saw no Falshood or Malice in “ it, that it was no Libel.” The other three Judges, it is true, were of a different Opinion; but their Opinion has ever since been held infamous, and his in the utmost Veneration, and will transmit his Name with Honour to Posterity, so long as History lasts.

Mr. Attorney General *Northey*, in an Information against the Defendant for a Libel, on Lord (c) *Holt*’s observing, that an Information would lie for speaking ironically, said, that it was laid to be wrote *ironice*, and that the Defendant ought to have shewn at the Trial, he did not intend to scandalize, and that the Jury were Judges *quo Animo* this was done, and they have found the ill Intent (d).

Whether any Act was done or any Word spoken, in such or such a Manner, or with such or such an (e) Intent, the Jurors are Judges. The Court is not Judge of the Matters that are Evidence to prove or disprove the Thing in Issue. This is our Law, both in civil and criminal Trials, although the latter are by far the most material, because what affects our Person, Liberty, or Life, is of more Consequence than what merely affects our Property.

The Statutes (f) against Slander and *Scandalum Magnatum* direct only, that he who shall be so hardy as to tell or publish any false Names or Tales, whereby Discord or Slander may grow between the King and his People, or the great Men of the Realm, shall be taken and kept in Prison, until he has brought him into the Court, who was the first Author of the Tale.

The Honourable Mr. Justice (g) *Barrington* says, that (g) *Bacon* (or rather (b) *Selden*) hath a very spirited Observation on the Statutes

(a) *Coler*’s Decis. 154. Vol. II. Tit. 30. Sect. 5.

(b) 4 St. Tri. 394.

(c) The Author of the Digest concerning Libels, P. 6. in Notes, seems mistaken in citing what was said by the Attorney General, as delivered by *Holt*.

(d) 11 Mod. 86. pl. 5.

(e) Mr. Justice *Holloway*, in the said Trial of the seven Bishops, observed to the Jury that “ the End and Intention of every Action was to be considered,” and then applied the Rule to the Case before him. 4 St. Tri. 394.

(f) Stat. Westm. 3 Edw. c. 34. 2 Rich. 2. St. 1. c. 5. 12 Rich. 2. c. 11.

(g) *Bar. Observ. on Stat. 59. Note (g). Edit. 1766.*

(b) I was very desirous of reading the Passage cited from *Bacon* or *Selden*; *Bacon* or *Selden*, what a Reference! no Page, no Volume; the Judge hath not been pleased so much as even to inform us, whether he means by his Quotation, Lord *Bacon*, *Nathaniel Bacon*,
against

against *Scandalum Magnatum*, viz. That it is an *equal Offence* in the King, to conceive Ill of his People, as it is in the People to conceive Ill of their King.

The Notion of pursuing a Libeller in a *criminal* Way at all, is alien to the Nature of a free Constitution. Our ancient common Law knew of none but a civil Remedy, by special Action on the Case for Damages incurred, to be assessed by a Jury of his Fellows. Indeed, the Doctrine in Courts of Law used to be, that, no (a) Writing whatever is to be esteemed a Libel, unless it reflect upon some particular Person. There was no such Thing as a public Libel known to the Law. In order, however, to gratify some of the great Men, in the weak Reign of *Richard the Second*, some Acts of Parliament were passed to give Actions for false Tales, News, and Slander of Peers or great Officers of State, which are now termed *de Scandalis Magnatum*. Before that Time, or at most, the Statute of *Westminster the First*, no mere Words were actionable, unless some special Damage thereby was alledged and proved. Even now-a-days the Courts of Common Law will not sustain Actions for mere (b) obscene Discourses, by Word of Mouth or Writing, or for Ribaldry. They leave such spiritual Concerns to the ecclesiastical Censures of Courts christian.

It will not, I apprehend, be too much to conclude from the above Premisses, that a Libel must be *malicious* as well as *false*, in order to make the Party so far criminal, as to bring him within the Reach of the Law; and whether the Libel be *false* and *malicious*, being Matters of (c) Fact and Evidence, and not Points of Law; they are to be left to the Determination of a Jury, and not to the Decision of the Judges, according to the old Rule "*Ad (d) Quæstiones Facti non respondent Judices, ad Quæstiones Juris non respondent Juratores*," Guilt is not to be presumed from the Act of the Party, until that Act be proved malicious; for the Law of England is a Law of Mercy (e), and *presumes* every one *innocent*, till he be found guilty by a Jury of his Equals; the Law hath adopted ano-

or *Matthew Bacon*; all these were Authors, all these favoured the Public with their Writings on the Law of England; as to *Selden*, his Works consist of six large Volumes in Folio.

(a) *Hawk. Pl. Cr.* 195. Chap. 73. Sect. 9. 3 *Bac. Abr.* 494. 4 *Read. Stat. Law.* 151. Lord *Raym.* 486. *Fortesc. Rep.* 98. 2 *Stra.* 789. 2 *Kel.* 230. pl. 183. 2 *Barnard. B. R.* 138. 166. 3 *Salk.* 224. pl. 1.

(b) See *Fortesc. Rep.* 98. 99.

(c) Sir Robert Sawyer as Counsel insisted, on the Trial of the seven Bishops, that "the Falsity, the Malice, and the Sedition of the Writing, were all Facts to be proved." 4 *St. Tri.* 367.

(d) *Co. Lit.* 295. b.

(e) 3 *Inst.* 107. 2 *Bulstr.* 147.

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ther Rule or Maxim in Confirmation of this Doctrine, as to criminal Matters ; which is, that “ (a) *Actus non facit reum, nisi Mens sit rea.*” So that the *mere Vender* of a Libel seems not liable to any Prosecution whatever, much less to that of an Attachment, in Case the Author, Printer, or Publisher is amenable to Justice.

But I may be told that if a Bookseller, being convicted of *publishing* a Libel, is obliged, as *Part* of his Punishment for such *Publication*, to enter into a Recognizance for good Behaviour, that is to say, not to publish a Libel for a certain Period of Time, does yet, notwithstanding so solemn an Engagement to a Court of Justice, presume to *publish* a Libel within the Time, that such *second Publication* is a Contempt to all Courts of Justice, and the Breach of the Recognizance a particular Contempt to that Court, in which he entered into the Recognizance.

But those who argue in this Manner, do not seem to have at all considered the Force or Tendency of their Arguments, for surely they prove too much ; because if the *second Publication* carries with it so much Guilt, and subjects the Party to so great Penalties, does not the Law require a clear unanswerable Evidence for his second Conviction ? Shall he be obliged to convict himself without Judge, without Proof, without a Jury ?

It is true that *selling* is *publishing*, but it is as true that it is publishing by mere Implication of Law, and no otherwise ; and this Implication arises from *Necessity*, in order to prevent the Crime of libelling escaping unpunished, which would be the Case, where no Name, or a fictitious one was affixed to the Publication, for then Courts of Justice could proceed (I mean by the Interposition of a Jury) only against the Vender, who is besides, liable to a further Penalty ; for whoever sells any Pamphlet, without the true Name or Place of Abode of some known Person, by or for whom the same was really and truly printed or published, written or printed thereon, such Seller shall forfeit the Sum of 20*l.* with full Costs of Suit (b).

I defy *Westminster-Hall* to produce me an authentic Precedent, by which it appears, that a Court of Justice ever continued their Proceedings against the *mere Vender* of a Libel, when the Author, Printer, or Publisher, was amenable to Justice ; on the contrary, there are many Instances, where they have stayed Proceedings against even the *real* Publisher, upon the Authors discovering themselves. I recollect particularly the Cases of *Doctor*

(a) 3 Inst. 107.

(b) By Stat. 10 An. c. 19. S. 113.

(a) *Middleton*, and Doctor (b) *Smollet*; the Appearance and Acknowledgment of the former, that he was the Author of the Libel in Question, procured the Indemnity of his Publisher, and the like honourable Behaviour of the latter obtained the Indemnity of his Printer.

If this Implication of Law be otherwise construed, it must follow, that Part of the Punishment of a Bookseller, who is convicted of having published a Libel, will be to be bound under a severe Penalty, by himself and Friends not to *sell* at all, or in other Words, to shut up his Shop for seven Years, since it must be allowed that if a Bookseller may *not sell*, he may as well shut up his Shop, nay better; for keeping it open under such a Restriction, will be standing at a certain Expence, without the Possibility of earning a single Shilling; and who do you think will become bound under such a Condition for a Bookseller? and if nobody will, then the offending Party is liable to *perpetual Imprisonment*, a Punishment totally unknown to the Law of *England*. This may be an Answer to such as are desirous of knowing why a Bookseller chooses rather to lie in *Newgate*, and carry on his *Trade*, than be out of Prison, as he must then be out of Trade.

An Action brought against a Man for letting his Dog loose, which he *knows* is accustomed to *bite*, seems applicable to a Prosecution against the *mere Vender* of a Libel, with this Difference in Favour of the latter, that the Law always shews greater Indulgence to Defendants in *criminal*, than in *civil* Prosecutions.

The Gift of the Dog-Action is, that the Party *knew* his Dog was accustomed to *bite*; is it not then as proper and reasonable that the Prosecutor on a *criminal* Prosecution for a Libel, as a *civil* Suit may be, and often is commenced for this Offence, a *criminal* Proceeding, especially that of Attachment, seems rather *vindictive* than a *legal*, is it not then I say as reasonable, that the Prosecutor on this Prosecution should *prove* that the Defendant *knew* the Pamphlet or Book which he *sold*, to be a Libel, and that the Defendant knowing it to be so, *published* it *maliciously*? for if any one *sells* a Libel, knowing it to be a Libel, most certainly he publishes it *maliciously*.

There does not seem to me to be any more Reason to say, that a Bookseller, who is under a Recognizance for his good Behaviour, forfeits such Recognizance by *selling* a Libel, than there is for saying, that a Man who is under a Recognizance to keep the Peace, breaks the Peace by wearing a Sword; the Reason given in

(a) See P. 9.

(b) See P. 9. and Dig. Lib. 81.

this last Case is, that it is the *Fashion* for every Gentleman to wear a Sword; so in the former, it is the *Custom* for every Bookseller to sell Books and Pamphlets.

But to conclude with an Argument, which, in my humble Apprehension, is decisive as to the Matter in Question, if we may presume to ground any Opinion on the Authority of Law Books; for it appears by the Reports, to have been solemnly determined, in the Court of *King's Bench*, more than once (a), that no Interrogatory that is leading to a *Penalty*, ought to be exhibited, under an Examination, on an Attachment for a Contempt.

One of the Cases alluded to, was thus (b):

"The Defendant presented a Petition to the Common Council of London, reflecting upon one of the Aldermen, and used contemptuous Words of the Court of *King's Bench*, at the same Time; for the Petition the Court granted an Information against him, and those who signed it, and for the Contempt, an Attachment.

"The Prosecutor in his Interrogatories asks him, if he did not present the Petition, and use such and such Words? And now the Defendant moved, that the Interrogatory, as to presenting, might be struck out, because it is making him accuse himself of that which will convict him of the Libel. *Et per Curiam*; he is not obliged to answer it."

Now let us state the Case under Consideration.

The Defendant being under a Recognizance in a large Penalty, not to publish any obnoxious or exceptionable Book or Pamphlet whatsoever, sells a Publication supposed to be a Reflection on the Court of *King's Bench*; for the Contempt the Court grants an Attachment against him.

The Prosecutor in his Interrogatories asks him, if he did not sell the said Pamphlet reflecting on the Court of *King's Bench*.

May not the Defendant move, (according to the above Case in Sir *John Strange*) that the Interrogatory, as to selling, may be struck out, because it is making him accuse himself of that which amounts to a *Forfeiture* of his Recognizance? Most certainly he may.

But as I observed (c) before, the Defendant not being allowed a Copy of the Interrogatories, nor any Time to consider of their Propriety or Tendency, or to advise with Counsel or Solicitor thereon, he is deprived of availing himself of this Advantage, which the Law

(a) 12 Mod. 499. *Stra.* 444.

(b) *Stra.* 444.

(c) Ante 13.

44 ATTACHMENTS of CONTEMPT.

gives him in this particular Instance; viz. of demurring or refusing to answer the Interrogatory, leading to a Penalty as aforesaid; so that in this Case, thus circumstanced, there seems to be a manifest Failure of Justice.

Upon the whole, therefore, I venture to declare, as an *English* constitutional Crown Lawyer, that the *mere Vender* of contemptuous Writings, though they be on Judges or on Courts of Justice, and though neither Author, Printer, or Publisher, be amenable to Justice, is not liable to be proceeded against, by that oppressive and arbitrary *Star-Chamber* Process, called an Attachment of Contempt; but that he may, by the Constitution of his Country, demand as a Right, not petition for as a Favour, that glorious Boast of *Englishmen*, that noble Badge of their universally admired and envied Liberties, a TRIAL BY JURY.

E R R A T A.

Page.	Line.	
8.	29.	<i>dele (k).</i> In Notes, for (k) (l) read (l) (m).
12.	30.	after Defence, add a Mark of Interrogation.
13.	28.	after Master add (by Virtue of a Rule of Court, to be obtained on Motion.)
14.	28., 29.	for of read to.
19.	24.	after Customs read as.
	40.	<i>dele (a).</i>
20.	2.	after &c. add (a).
35.	13.	for Siting read Sitting.
	18.	for second read third.
39.	31.	for Seden read Selden.
40.		Note (e) for 3 Inst. 107. read 2 Inst. 315.
41.	12.	for publish read sell.
		for Publication read Sale.
	18.	for Publication read Sale.
42.	17.	for chooses read chose.
	27.	after Libel add for.
	30.	after than <i>dele a.</i>

ALTERATION

OF

RECORDS.

ALTERATION

OF

RECORDS

A N
I N Q U I R Y
I N T O T H E
D O C T R I N E,

LATELY PROPAGATED CONCERNING
The ALTERATION of RECORDS,
UPON THE
PRINCIPLES of LAW, and the CONSTITUTION,
PARTICULARLY AS IT RELATES TO
PROSECUTIONS for LIBELS.

With NOTES, REFERENCES, and OBSERVATIONS.

By an ENGLISH CROWN LAWYER.

Modern Practice cannot alter the old Law.

Honest Judge POWELL.

INQUIRY

DOCTORS

THE ALTERNATION OF RECORDS

REMARKS ON THE CONSTITUTION

FROM THE

WILL NOT BE REFERENCED TO OBSERVATIONS

BY AN HONEST CROWN LAWYER

Addressed to the House of Commons
March 10, 1791

A N

INQUIRY, &c.

WHERE Liberty and Protection are the principal Objects of Government, nothing can be more alarming and dangerous to the People, than the Judges assuming a Power of employing their own Discretion, instead of the Law, in the Administration of Justice. It will be a superlative Degree of Folly to suppose ourselves governed by Law, if the Judges can exceed or abrogate the Rules of it, and punish us for saying we are oppressed. The Law is Matter of Institution, a Judge hath nothing to do with the Reasons of it; his Office is merely ministerial, and solely to declare what it is, not what it (a) should be; there the Line of his Power is drawn. He who passes it either through Vanity, Presumption, or Corruption, is a Traitor to the Public. The Spirit of the common Law, in the Strictness of holding the Judges to such Precisions, as not to be authorized to amend any Record before them, even in a Syllable or a Letter, is not generally perceived, or the Force of it understood, which hath made some Judges more

(a) Sir William Parkins, who was concerned in the Assassination Plot, against King William III. on his Trial before Holt Ch. Just. prayed the Assistance of Counsel in Pursuance of Stat. 7 W. 3. c. 3. but though this Act had passed the Royal Assent before the Trial came on, yet it came on before the Act took Place, viz. the very Day next preceding its Commencement; upon which Occasion Holt said, "*We must conform to the Law as it is at present, not to what it will be to-morrow, we are upon our Oaths so to do.*" *Fost. Cr. Law.* 230, 232. 4 St. Tri. 630. 631.

bold than others in this Respect. Nevertheless, it is the Secret wherein the Strength of the Constitution lies, as the Strength of *Sampson* did in his Hair. It is the great and only effectual Bar that human Wisdom can raise to preserve the public Safety from Violation by the Judges. Was it otherwise, as they are Men subject to the Vices and Follies of Men; Arrogance, Caprice, Prejudice, Motives of State and Party, might usurp the seat of Justice, and the Law be forced to give way to whatever an overbearing Judge should be pleased to call common Sense: Nothing therefore concerns the Preservation of civil Liberty, as well as Property, more essentially than keeping up the old constitutional Bar against the Judges exercising any Discretion of their own not purely legal. This is a Subject of very serious Importance, and hath been defined with some Spirit.

The *legal* Discretion of a Judge (says an able (a) modern Writer) is a Knowledge or Understanding to distinguish between Falsity and Truth, between Wrong and Right, between Shadow and Substance, between Equity and colourable Glosses; and not to act according to one's own Will and private Affection; for as one has it, *talis Discretio Discretionem confundit* (b). The Judges of the common Law have interpreted *Wisdom and Discretion* to be a *legal Wisdom and Discretion* (c). Sir *Edward Coke* says, that Discretion only we allow of in this Place, which either grave and reverend Men have used in such Cases before, or rises out of the Circumstances of the Matter (d). For as by the Authority of *Littleton*, *Discretio est discernere per Legem, quid sit justum*, that is, to discern by the right Line of the Law, and not by the crooked Cord of private Opinion, which the Vulgar call *Discretion* (e). This is proved by the common Law in the Case of a special Verdict, *et super totam Materiam petunt Discretionem Justiciariorum*; i. e. they desire the Judges will discern by Law what is just, and so give Judgment accordingly (f). *Si a Jure decedas, vagus eris, et erunt omnia omnibus incerta*; and therefore Commissions which authorize any to proceed, *secundum sanas Discretionem vestras*, is as much as to say, *secundum Legem & Consuetudinem Angliæ* (g).

The *assumed* Discretion of a Judge is thus emphatically defined, by one of the first Lawyers in *Westminster-Hall*.

(a) *Green* in his Prefatory Discourse, to his excellent Treatise on "The Spirit of the Bankrupt Laws."

(b) 5 Rep. 100.

(c) 10 Rep. 140. 4 Mod. 115.

(d) Co. Lit. 62. b.

(e) Co. Lit. 227. b. 10 Rep. 140. 2 Bulstr. 197. 198. Hob. 158.

(f) 4 Inst. 41. Fortesc. Rep. 393.

(g) Co. Lit. 227. b. 10 Rep. 138.

“The Discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual, and depends upon Constitution, Temper, and Passion. In the best it is oftentimes Caprice, in the worst it is every Vice, Folly, and Passion, to which Human Nature is liable.”

Men of Learning and Ability assert, that there are a great Number of Cases to be produced, which will shew that the clear and known Rules of the common Law have been set at naught from Time to Time by the Exercise of the Judges own Discretion; and that where the Legislature hath given them Powers, which they had not by the common Law, they have exceeded and enlarged them in the same Manner, thereby assuming to themselves a legislative Authority destructive of the Nature and Principles of a free Government. By reading the Law Reports, it will often appear that a Judge hath exceeded the Rule he ought to have been bound by, and by that afterwards another Judge hath done the same, and justified it by citing the first Error for an Authority; so that after a Repetition they have made Error Law, and invented a Maxim to support it, viz. *communis Error facit Jus*.

This Subject may be fully illustrated by an attentive Investigation of the Doctrine of Amendments at common Law, under the several Statutes which have altered it, and the extrinsical Practice of the Judges down to this Time.

The little Room for Amendments was from the original Constitution of the Courts of Justice, according to L. C. B. (a) Gilbert, who grounds his Opinion on the following Passage in (b) Britton.

“But (c) notwithstanding we have granted to our Justices the Power of inrolling Pleas pleaded before them, yet we will not (d) suffer their Records to be Warrants to justify their own Misdoings, nor that they erase their Records, nor amend them, nor record contrary to their Inrolment; for our Pleasure is, that the Power of our Justices be so limited, that they do not exceed the Articles of our Writs, nor of the Presentments of Jurors, nor of the Complaints entered before them.”

The above was an Ordinance of Edward the First enjoining the Duty of Judges; the King certainly intended the Injunction for the Benefit of his People; it was to prevent their being injured from

(a) *Gilb. Hist. C. B. 107. Bac. Abr. 89.*

(b) A very ancient Law Writer, so far back as the Reign of Edward the First, whose Authority can be disputed upon no other Ground, than his having been dead above fifty Years.

(c) *Britton. Fol. 2. b. 3. a. See Stat. 8 Rich. 3. c. 4. The Penalty if a Judge raise a Roll.*

(d) *Gilb. Hist. C. B. 107. Bac. Abr. 89.*

the Clerk misstating the Opinion of the Court, in reducing it to Writing; but it is observable that the King will not that his Justices exceed the *Plaints entered before them*, that is, as I apprehend, *that they shall not alter the Allegations of the Party*, that they shall neither erase nor amend them. Can any Construction be more reasonable than this? Can any be more agreeable to the Spirit of the (a) Ordinance? A Judge acting contrary to this Law might prove of the most mischievous Consequence, for a Man charged with only a mere *Trespass*, might by this Means be *tried for high Treason*. A single Judge privately at Chambers might alter the Word *Tenor* to *Purport*, in an Information for a Libel; and thus deprive the Defendant of pleading *de novo*, and making such Defence, as the Nature of the Alteration might necessarily require, and this by *not ordering* the Alteration to be made *till* the very Evening next preceding the Day of Trial.

A modern most elegant Writer, seems to have prostituted his Character as a Lawyer, in no Instance so much, as in that, wherein he is pleased to *censure* the Judges, for scrupulously declining to alter their Records, without the Sanction of an Act of Parliament (b); However he hath the Candor to admit, that “they may, through a decent Degree of Tendernefs, excuse themselves from amending in *criminal Cases*; “that they need not grant an Amendment, where it will work an “*Injustice* to either Party; or where he cannot be put in as good a “Condition, as if his *Adversary had made no Mistake* (b).”

A late learned and judicious (c) Writer says, he “would ask by “what Authority or Book Case, a single Judge hath an undoubted “Right to summonce Attornies to his Chambers, and direct Amendments in the Records of the Court? And whether the Course, “(which is the Law) of the Court, hath not constantly been, where “either Party is desirous of altering a Record, to apply by Counsel “in open Court for that Purpose? And the Reason is obvious, viz: “because a Record being the Act of the Court, that is, of all the “Judges thereof, they ought all to be applied to, for Leave to make “an Alteration in their own Act.”

L. C. J. (d) Coke says, all Causes ought to be heard, ordered and determined before the Judges of the King's Courts, openly in the King's Courts, whither all Persons may resort; and in *no Chambers*, or other private Places: for the Judges are not Judges of *Chambers*,

(a) Doctor Blackstone says, that this Ordinance was made, that a Record should not by any private Rasure or Amendment, be altered to any sinister Purpose. 3 Black. Com. 407.

(b) 3 Black. Com. 409.

(c) The Author of the Preface to Dig. Lib.

(d) 2 Inst. 103. 104.

but of Courts, and therefore in open Court, where the Parties, Counsel, and Attornies attend, ought ORDERS, Rules, Awards and Judgments to be made and given; and not in *Chambers*, or other private Places, where a Man may lose his Cause, or receive great Prejudice or Delay in his Absence for Want of Defence; nay, that Judge who ordereth or ruleth a Cause in his *Chambers*, though his Order or Rule be just, yet *offendeth* he the Law, because he doth it not in Court. And the Opinion is good and agreeable to this Law, *Qui aliquid statuerit Parte inauditâ alterâ, Æquum licet statuerit, haud æquum fuerit*, neither are Causes to be heard upon *Petitions*, or *Suggestions* and *References*, but in *Curiâ Domini Regis*.

Motion in Arrest of Judgment on an Indictment for libelling the Government, and the Objection made was, for that the Charge, which was laid to the Defendant, was not so certain and particular as it ought to be, for the Libels were not set forth in *hæc Verba*, as they ought; neither was the Defendant charged directly with writing or making the very Words and Sentences expressed in the Indictment, but only that he made and wrote *Libels*, in which among others, was contained "according to the *Tenor*" and "to the *Purport* (a) following." After the above Case had depended in the *King's Bench* several Terms, and after it had been several Times argued at the Bar, it was agreed by *Holt* Chief Justice, *Rokeby* and *Turton* Justices, upon solemn Argument on the (b) Bench, that if the Indictment had been for a *Libel*, containing, among other, "to the *Purport* following," it had been (c) ill, because it had not imported, that the Words were the specific Words which were in the (d) *Libel*. The Court must be Judge of the Words *themselves*, and not of the Construction the *Prosecutor* puts upon them, but "according to the *Tenor* following" imports the very Words (e) themselves. For the *Tenor* of a Thing is the (f) *Transcript*; and *Rokeby* said the Words "to the *Purport*," were lose and *useless* Words; and the Words "according to the *Tenor*," being of a certain and more strict Signification, the Force of the latter was not hurt by the former, which *Holt* Chief Justice agreed (g) to; and if on the Trial, the Words in the *Libel* had not been *exactly* the same, with the Words in the *Indictment*, the Defendant could not have been found guilty (h).

(a) *Carth.* 408. 3 *Salk.* 226. pl. 5.

(b) *Lord Raym.* 415.

(c) 12 *Mod.* 218. 3 *Salk.* 226. pl. 5.

(d) *Lord Raym.* 415. 3 *Salk.* 226. pl. 5.

(e) 11 *Mod.* 79. 85. 96. 3 *Salk.* 226. pl. 5.

(f) 2 *Salk.* 661. 3 *Salk.* 225. 226. pl. 5.

(g) 2 *Salk.* 417.

(h) 12 *Mod.* 218. 219. 3 *Salk.* 225.

The just now cited Ordinance of *Edward the First* was so rigidly observed, that *Ralph de Hengham*, Chief (a) Justice of *England* in that King's Reign, moved with Compassion for the Circumstances of a poor Man, who was fined 13s. and 4d. in an (b) Action of Debt, caused the (c) Record to be *raised*, and made 6s. and 8d. he was (d) fined 800 Marks for this Offence.

The learned Doctor *Blackstone's* Remarks on *Hengham's* Case, seem rather *equivocal*, for in the (e) *Body* of his Commentaries, he observes that "in Strictness it was certainly *indefensible*," and in the (e) *Note*, he says "certainly *his* Offence was *nothing* very *atrocious* or *disgraceful*; for though removed from the *King's Bench* at this Time, we find him about 12 Years afterwards made Chief Justice of the *Common Pleas*, in which Office he continued till his Death." Would not this Reasoning of the Doctor's be much more conclusive, were there not Instances of Gentlemen of the long Robe, who, finding the Business of the Bar not answer, have had Interest, by means of *Family Connections*, to advance themselves to the Bench?

With the (f) Fine of 800 Marks the Clockhouse at *Westminster* was builded, and furnished with a (g) Clock, which continueth to this Day (h).

Hengham's Case Justice *Southcot* remembered, when *Catlyn* Ch. Just. B. R. in the Reign of Queen *Elizabeth* would have ordered a *Razure* of a (i) *Record* in the like Case, which *Southcot* utterly denied to assent unto, and said openly (i) in Court, that he meant not to build a Clockhouse.

Thus we see how very cautious the Judges were formerly of *raising* a *Record*, and how very severely the Lord Chief Justice of the Court of *King's Bench* was fined for doing it, (eight hundred Marks, a large Sum in those Days,) though the Chief Justice's Offence was an Act inspired by Humanity alone, and done from a mere Motive of Compassion to a poor Man, who had been *excessively*, and consequently *illegally* fined.

(a) 4 Inst. 255. H. H. P. C. 649.

(b) 3 Inst. 72. *Fortesc. Rep.* 393.

(c) 4 Inst. 255. *Fortesc. Rep.* 393.

(d) 2 Rich. 111. 10. 3 Inst. 72. 4 Inst. 255. *Fortesc. Rep.* 393.

(e) 3 *Black. Com.* 408.

(f) Which Sum was entered on the Roll. 4 Inst. 255.

(g) It hath been said, that the original Bell to the Clock is the same that now hangs in St. *Paul's* Steeple. Upon this Story is it observable, that the first Introduction of Clocks was not till 100 Years afterwards, about the End of the fourteenth Century. 3 *Black. Com.* 408. in Note (x).

(h) 3 Inst. 72. 4 Inst. 255.

(i) 4 Inst. 255.

Was I inclined to be facetious, an Opportunity offers, for in Allusion to the Clock being set up in *Westminster-Hall*, which was paid for out of this Fine, it hath been said to be a very *striking* Memento to the Judges; but I mention it as a modern eminent judicial (a) Writer declares he does, *without meaning to pun*. In my Apprehension the Case suggests as good an Opportunity at least, of being serious, for it was no Defence, no not even to the Lord Chief Justice of *England*, who had acted contrary to his Oath of Office, to his Duty, and to the Law of the Land; that he did it in Compassion to the Circumstances of a poor Man, who, as such, was excessively (b) fined.

If the Lord Chief Justice of the Court of *King's Bench* was punished thus severely for altering a Record, and which Alteration was meant to *relieve*, what are we to think of that Judge who alters a Record in order to *convict*?

At Common Law the Judges could make no Amendment in the Pleas of the Parties; it was only their own Mistakes respecting Form they could amend. This important Assertion doth not depend on the Authority of *Britton* only, it is proved by all the Year Books from *Edward the Second* to *Henry the Seventh*; and even if they should not be searched on Account of their being above *fifty Years old*, the (c) first Statute of Amendment remains unrepealed, and is Evidence in the Case incapable of Contradiction.

Previous to our laying before the Reader an Extract from the several Statutes of *Amendment*, and the Opinions of the Courts of Justice thereon, it seems proper to apprise him of the Distinction between Statutes of *Amendment* and Statutes of *Jeofails* as they very materially differ one from the other, which does not seem to be at all attended to, by former Writers on this Subject. The Statutes of *Amendment* are those Laws by Virtue of which, the Judges are authorized to rectify and set right Mistakes occasioned by the inserting a Letter or Syllable too much or too little, by the Misprision of the Clerk. The Statutes of *Jeofails* are those Laws, by Virtue of which Mistakes, though not amended, shall not vitiate, vacate, or make void, the Judgment of the Courts. These latter Statutes are not within our present Purpose to discuss, we will proceed to those which are, viz. the former ones.

(a) The Honourable Mr. Justice *Barrington*.

(b) For as this Fine was much more than the Defendant could ever be able to pay, the imposing it was contrary to *Magna Charta*. See Stat. 9 *Hen.* 3.

(c) Stat. 14. *Edw.* 3. c. 6.

The (a) tying down the Courts of Justice so strictly not to alter their Records, was found very inconvenient, and many Judgments were reversed by the Misprisions of Clerks, &c. wherefore,

By Stat. 14. Edw. 3. c. 6. (which was the first (b) Statute for Amendment) "By the Misprision of Clerks, no Process shall be annulled or discontinued by mistaking one Letter or one Syllable too much or too little; but as soon as the Thing is perceived it shall be amended."

Lord (c) Coke says, that though this Statute expressly mentions only one *Syllable* or one *Letter*, that yet the Judges construed it to extend to a Word, which his Lordship observes was a very favourable Construction in the Judges, for the Benefit of the Suitor.

As for the Mistake of a Letter merely (says a modern (d) juridical Writer) it is very extraordinary that this should have been fatal, as at this Time no one (not even the greatest Clerks) could spell with any Accuracy; nay the same Word, in the same Period, is often spelt in a different Manner throughout the Body of ancient Statutes; it was indeed absolutely impossible, that, before the Use of Printing, Accuracy in Spelling (which depends so much upon Memory and extensive Reading) could have been brought to any regular Consistency or Perfection.

But as Learning is now so much improved, and the Art of Printing hath now been so long in Use among us, modern Judges seem, even in the Opinion of this Writer, bound to adhere to the Letter of this Law.

Is it possible any Thing can be more decisive than this Statute, of what the common Law then was? for can it be conceived an Act of Parliament would have been made to amend a *Letter* or *Syllable*, if such Amendment could at that Time have been made without it? all the Sophistry to be acquired by reading *Tully* over and over again, and translating every Part of *Demosthenes*, will be greatly insufficient to baffle the Evidence of this Statute, in which the Spirit of the Constitution is manifest by the Restraint it contains, that even such one *Letter* or one *Syllable* shall not be amendable, unless the Fault be through the Misprision or Mistake of the Clerk in Writing.

(a) *Bac. Abr.* 90.

(b) *Com. Dig.* 338.

(c) 8 *Rep.* 158. a.

(d) *Bar. Observ.* on Stat. 209.

Lord Coke (a) says, the Judges were not agreed whether they could make these Amendments, as well *after* Judgment as *before*; therefore,

By Stat. 9 (b) Hen. 5. c. 4. "The Justices before whom the Plea or Record is made, or shall be depending, as well by Adjournment as by way of Error or otherwise, shall have Power to amend such Record and Process, as well after Judgment as before."

By Stat. 4 Hen. 6. c. 3. "The said Statutes shall not extend to *Wales*, nor to Records or Process, whereby any Person shall be (c) outlawed at any Man's suit."

But (d) this first Exception seems to be annulled by Stat. 27 Hen. 8. c. 26. by which it is enacted, That the Laws of *England* shall be used, practised, and executed in *Wales*.

Though (e) these Statutes gave the Judges a greater Power than they had before, yet it was found that they were too much cramp'd, having Authority to amend nothing but (f) Process, which they did not construe in that large Signification, as to comprehend the whole Proceedings, but confined it to mesne (g) Process, and Jury (b) Process, wherefore to enlarge the Authority of the Courts;

By Stat. 8 Hen. 6. c. 12. S. 2. "The Judges of the Courts, in which any Record, &c. shall be, shall have Power to examine such Record, &c. and to amend in Affirmance of Judgments all that in their (i) Discretion seemeth to be Misprision of the Clerk; and if any Record, &c. be certified defective, otherwise than according to the Writing which thereof remaineth in the Places from whence they be certified, the Parties, in Affirmance of the Judgments, shall have Advantage to alledge Variance betwixt the same Writing and the said Certificate; and, that found and certified, the same Variance shall be by the Judges amended according to such Writing."

(a) 8 Rep. 157. b.

(b) Perpetuated by Stat. 4 Hen. 6. c. 3.

(c) This Statute, instead of extending the two former, is a Repeal of them both as to all Process of Outlawry, which is a further Proof of the extream Jealousy our Ancestors then continued to entertain of the discretionary Power of Judges.

(d) 2 Saund. 40.

(e) Bac. Abr. 90.

(f) An Original, or other Writ in Nature thereof, is not included within the Word "Process." 8 Rep. 157. a

(g) Process previous to the Writ of Execution.

(b) Viz. the *Venire*, and the *Disfringas*.

(i) For the true Distinction between the legal and assumed Discretion of a Judge, see P. 50, 51.

It is observable, that the Authority to amend given by this Act, cannot take Place till *after* Judgment.

By Stat. 8 Hen. 6. c. 15. "The Justices, before whom any Misprision or Default shall be found in any Records and Process hanging before them, as well by Way of Error as otherwise, or in the Returns of the same made by Sheriffs, Coroners, Bailiffs, or any other, by Misprision of the Clerks, or of the Sheriffs, &c. shall have Power to amend such Faults and Misprisions by their (a) Discretion, and by Examination thereof by the Justices; this Statute not to extend to (b) *Wales*, nor to Processes and Records of (c) Outlawries of Felonies and Treasons."

Notwithstanding (d) the great Enlargement of the Power of the Judges, by the above recited Statutes in amending Writs, Process, &c. yet none of them were thought to extend to Writs of Error; and the rather, because such Amendment would not be in Affirmance of the Judgment; but it being found that defective Writs of Error occasioned great Delay of Justice,

By Stat. 5 Geo. c. 13. S. 1. "Writs of Error, wherein there shall be any Variance from the original Record, or other Defect, shall be amended by the Courts, where such Writs of Error shall be returnable."

Thus it appears, that the *Doctrine of Amendments* remained unaltered for near *three hundred Years*, viz. from the *eighth* Year of King Henry the Sixth, to the *fifth* of King George the First.

It (e) has been a great Question, whether any of the Statutes of Amendment extend to the Case of the King, either to remedy the Party, where he hath prevailed against the King, or the King against the Party; but as it hath been ruled in both Cases, and seems now established, that these Statutes do not extend to the King, it will be needless to enter minutely into this Inquiry; for though only Indictments, Appeals, and Informations on penal Statutes are excepted in Stat. 8 Hen. 6. c. 12. Sect. 2. yet because the first (f) Statute says, it

(a) For the true Distinction between the *legal* and *assumed* Discretion of a Judge, see P. 50, 51.

(b) But this Exception seems to be annulled by Stat. 27. H. 8. c. 26. by which it is enacted, that the Laws of *England* shall be used, practised and executed in *Wales* 2 Saund. 40.

(c) This Statute instead of extending the former, is a Repeal of them as to all Process of Outlawry, which is a further Proof of the extreme Jealousy our Ancestors then continued to entertain of the *discretionary* Power of Judges.

(d) Bac. Abr. 95.

(e) Bac. Abr. 95. Salk. 51. 52. Com. Dig. 339. 2 Lord Raym. 1065. 1066. 1070. 1071. See Com. Dig. 362.

(f) 14 Edw. 3. c. 6. See P. 56. Com. Dig. 338.

shall

shall be amended on the Challenge of the Party, in which the King cannot be included, the subsequent Statutes are supposed to be made on the same Plat-Form; and that this Exception is only *ex abundanti Cantelâ*.

From the Statutes of *Amendment*, (says Judge (a) *Barrington*) not extending to criminal Proceedings, many Criminals have escaped the Punishment due to their Crimes, to the great Encouragement of other Offenders, and to the Disgrace of the Law.

The same (a) Author owns that he is not aware of any material or solid Objection to make those Statutes extend to criminal Proceedings: that no one could have heard of the late Application to the House of Lords in the Case of (b) *Luckup*, to reverse a Judgment of the *King's Bench*, for what is called *Error*, but must have wished *that there was such a Power to amend*.

We have looked into *Luckup's* Appeal, and do not find, that the Power of *amending* that Record, was the Question before the House; but whether the Judgment, as it then stood on the Record, *unaltered*, was a *legal* Judgment?

This Difficulty (says the same (a) Writer) with Regard to altering a Record, is entirely peculiar to the Law of *England*; and being carried to the absurd Excess and Strictness to which there was formerly a most blind Adherence, hath occasioned the many Statutes of *Amendments* and *Jeofails*. He does not, however, mean by this to insinuate that Records should be wantonly altered, but only where the Alteration *does not materially affect the Point in Dispute*, and where the Alteration is made under the Controul of the superior Courts.

(a) *Bar Observ. on Stat. 200.*

(b) We wonder the learned Welch Judge did not assure us, that he *spelt* this Gamester's Name "*Luckup*," *without meaning to pun*. See P. 55. The Hero of this Note was well represented, as was also a noted Limb of the Profession, properly and deservedly stigmatized, by the facetious Mr. *Foot*, in his admirable dramatic Satyr of "*The Devil upon two Sticks*;" and we embrace, with the highest Satisfaction, this Opportunity of contributing our Mite of Applause to him for our Entertainment. We confess ourselves at a Loss to determine which Parts of that judicious Performance most deserve Approbation. As Citizens of the World, (much more so at least than as *Lawyers*, in which Assertion we are under no great Apprehension of not being believed) we were pleased with the Definition of a *Flaw*, viz. "*a legal Loophole preserved by the Lawyers for Rogues to creep through, in order to prevent the Game from being totally destroyed*;" and we were of Opinion, that the Satyr was too *general* to need any *Apology*. Our Character will not permit us to indulge ourselves any further on this Occasion; otherwise our Inclination to do the Author, the Player, and the Manager, respective Justice, would carry us great Lengths; as we could add much to his Commendation in all these several Departments of the Theatre; to conclude, therefore, Mr. *Foot* hath convinced us, that he is blessed with the Poignancy of *Juvenal*, the Power of *Persius*, the Pleasantry of *Horace*, and the Wit of *Rabelais*; without the Indelicacy or Obscurity of any of them. *Though we had not an Opportunity of introducing this great Genius into the Body of our Work, we have swung him in the marginal Notes.*

The Notion of some Judges, that an Information for a Misdemeanor may be amended, under the Exception in the 8 Hen. 6. c. 12. because Appeals and Indictments of Treason and Felony are only therein expressed, hath no solid Ground to support it; the Meaning of the 8 of Hen. 6. being fully declared by the (a) Proviso in the Statute of *George the First*.

Such Notion is a manifest Misconstruction both of the Words of that Act, and the Meaning of the Legislature; for till after the civil Wars between the Houses of *York* and *Lancaster* were ended by the Victory in *Bosworth Field*; no such Thing as an *Information for a Misdemeanor* had ever been heard of in a common Law Court: for although it hath been said, that Informations were received at the Council Board, before the Erection of the *Star-Chamber*, no Record of any one of them hath come down to us, by which we can know of what Nature they were: And although it hath been said by some Judges, that Informations were by common Law, yet no Record was ever found in the *King's Bench* to verify such *Dictum*, till long after the 8th of Hen. 6. or before the Abolition of the *Star-Chamber*, out of which the Information for Offences was transplanted into that Court, not by Act of Parliament, but by the Boldness of the Judges, whereby, and by the common Maxim, *communis Error facit Jus*, it hath injuriously been established.

No Proposition in *Euclid* can be clearer than that every Amendment in Substance, or where the Matter amended did not appear to be a Misprision of a Clerk or Officer in Writing, hath been contrary to Law, and a Violation of the Constitution.

It is no Argument to justify an illegal Amendment, to say, it made no Alteration in the Sense of the Record: the Law hath not trusted a Judge with a Discretion to decide such a Question; upon what Ground then, unless it be of his own making, is a Judge to be justified, who ordered a Record, in a criminal Prosecution, by Information, the Evening before it was tried, to be amended in seven or eight Places of the substantial Part of the criminal Charge, from what it had been settled and altered by the Officer who exhibited it *ex Officio*, thereby making an Information either bad, or supposed to be bad, as it stood before the Amendment, good and sufficient to

(a) Which Proviso is conceived in the following Words: "Provided that nothing in this Act contained shall extend, or be construed to extend to any Appeal of Felony or Murder, or to any Process upon any Indictment, Presentment, or Information of or for any Offence or Misdemeanor whatsoever." Thus you see the same Spirit is preserved as fully in this Act, as in any of the former ones.

incur a severe Punishment, which otherwise could not have been the Consequence? Is there a Precedent that authorizes such an Amendment at common Law? Is there an Act of Parliament that warrants it? If there be neither the one or the other to justify it, no Offence can be greater, or of a more dangerous Nature to the Constitution, or more to the Dishonour of the Crown: it tends to the Introduction of arbitrary Power: it constitutes the Judge a Bashaw: it subverts the Law of the Land: it destroys the Idea of Liberty, by making the *Magistratè* CONVICT, where the *Law does not so much as even ACCUSE*.

As (a) the Statutes of *Amendments* extended only to what the Justices should interpret the Misprision of their Clerks and other Officers, it was found by Experience, that many just Causes were overthrown for Want of Form, not aided by any of the above Statutes, though they were good in Substance: wherefore, for the further Relief of the Suitors, the several Statutes of *Jeofails* were made, but these, as we observed before, are not within our present Purpose to discuss.

The Reader, we presume, is by this Time perfectly satisfied, that no Record of the Pleas of the Parties is amendable, either at common Law or by Statute, otherwise than the Misprision of a Clerk or Officer; and not where a Fault arises from Ignorance, Mistake, or Error, in the drawing or in the Substance of any Charge or Allegation, in any criminal Prosecution whatsoever.

The Word *Tenor*, in Point of Law, signifies an *exact* (b) *verbatim Copy* of the Original; the Word *Purport*, in Point of Law, signifies an *Abstract only* of the Original: and it is upon this Foundation solely, that a Defendant, in a Prosecution for a *Libel*, hath oftentimes nothing more to depend on for his Defence, than comparing the *Libel* set forth in the Record, with the *Libel* itself; for if the *former* happens to differ from the *latter*, in only one single *Letter*, such Variation, though the *Sense* be not (c) altered thereby, is fatal, and will occasion Judgment for (d) the Defendant; for if a *Libel* be set forth in these *English Words*, a Variance (said the Lord Chief Justice (e) *Holt*) spoils the whole Information; it is true, said his

(a) *Bac. Abr.* 90.

(b) 2 *Salk.* 660. pl. 7. 3 *Salk.* 225. 226. pl. 5. 12 *Mod.* 218.

(c) 2 *Salk.* 660. pl. 7. 3 *Salk.* 224. pl. 1. 226. pl. 5.

(d) 11 *Mod.* 96. 97. 2 *Salk.* 661. 12 *Mod.* 218. 219.

(e) 11 *Mod.* 96.

Lordship,

Lordship, the Difference is trifling, but what Rule shall the Court be guided by? Where shall we stop, if we begin to allow of any Variations in (a) Cases of *Libels*? If the Court (said Mr. Justice (b) *Powel*) was not to stop at a Word, where would be the *ne plus ultra*? The Consequence might be ill, in giving a Loose in Cases of *Libels*, for if Judges had such a Power, it might be carried to Cases of high Treason, and endanger Men's Lives by Inferences.

The Reasons of those Lords who were pleased to enter their Protests against some Proceedings, in Relation to the Case of Doctor *Henry Sacheverell*, in the House of Peers, seem most proper to close this Part of our Argument; we will therefore transcribe them.

Die Martis 14 Martii, 1709.

The (c) Question was put,

That by the Law and Usage of Parliament in Prosecutions, by Impeachments for high Crimes and Misdemeanors, by writing or speaking, the particular Words supposed to be criminal, are not necessary to be expressly specified in such Impeachments.

It was resolved in the Affirmative. *Dissentient*.

1st. (d) Because we conceive the Law of the Land is as much the Rule of Judicature in Parliament, as it is in the inferior Courts of Justice; and since, by the Opinion of all the Judges in all Prosecutions by Information or Indictment for writing or speaking, the particular Words, supposed to be criminal, must be expressly specified in such Information or Indictment; and that this is the Law of the Land, confirmed by constant Practice: we conceive that there is the same Reason and Justice for specifying in Impeachments the particular Words supposed to be criminal, for otherwise a Person who is innocent and safe by the Law, out of Parliament, may nevertheless be condemned in Parliament.

For we conceive, that some Reasons of Law and Justice, why the Words supposed criminal must be specified in Informations and Indictments, may be, that the Party accused may certainly know his Charge, and be thereby enabled to defend his Innocence; that the

(a) 11 Mod. 97.

(b) 11 Mod. 96. whom Lord Chanc. *Camden* honours with the Character of being "the only honest Man on the Bench," at the Trial of the seven Bishops. Dig. Lib. 54.

(c) 8 St. Tri. 565.

(d) This Protest is neither correctly printed, or inserted in due Order of Time, in "A Collection of the Lords Protests," published in 1767.

Jury

Jury may know it too, and be enabled thereby the better to apply the Evidence given by the Witnesses to the Matter of such Charge; and that the Judges themselves may the better judge of the Nature of the Crime, and of a Punishment adequate to it; which in Cases of Misdemeanors, which are indefinite and innumerable, must extremely vary, according to the Heinousness of the Offence; and finally, that the House of Lords, upon Complaint to them, may also judge whether the Fine, which is usually one of the Punishments for Misdemeanors, does not exceed the Demerit, especially since the Bill of Rights, exorbitant Fines are declared to be illegal; which Reasons seem to be fully as strong, in the Case of Impeachments, as in Indictments and Informations: for the particular Words are as necessary to enable the Lords to determine uprightly and impartially, as the Jury or Judges, and as necessary for the Defence of the accused here, as in the Courts below; and if there was to be a Difference, it seems more necessary in this high Court, for the weightier the Prosecution is, the more need has an unfortunate Man of Indulgence, and all lawful Favour; and surely there cannot be a heavier Load upon any Man, than an Accusation of all the Commons of Great Britain.

2dly, We do not remember any Precedent insisted on for the Maintenance of this Resolution, save only the Case of Doctor *Manning*, which, we conceive, could not warrant this Resolution: for,

1. The Words charged upon him by the Commons Declaration were not compared with the Sermons, though it was desired, and consequently no Lord could say, they were not the Words of the Sermon; and, therefore, upon such Uncertainty, we conceive, we could not ground a positive Resolution.

2. The Charge upon him taken out of his Sermon, on the fourth of May 1628, seems to be the very Words by him spoken, for they were attested by Ear-Witnesses, who surely never were or could be admitted to attest their own Conjectures of the Scope of a Sermon, and not specify the very Words, for that would be to make the Witnesses to be the Judges.

3. Besides, in such a Case as this, where the Party did not insist on any legal and just Exceptions, of which he might have taken Advantage, if he had made his Defence, which he did not, but submitted and begged Pardon; this ought not to be looked upon as a Precedent

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Precedent or Authority, to justify the Illegality of the Form of that Impeachment.

3dly. But although this Precedent was full, and express to the Point resolved, we humbly conceive, that one Precedent is not sufficient to support a Law and Custom of Parliament, nor consequently a Resolution declaring it; for surely there is a great Difference between a single Instance, and a Law and Custom.

4thly. Especially since, we conceive, that in all the Precedents, at least all that have appeared to us, for four hundred Years, of the Prosecutions in Parliament, the particular Words charged as criminal, have been constantly expressed in the Articles, or Declarations of Impeachments.

Edw. 2. *Exilium Hugonis de le Spencer Patris & Filii*. The first Article was, for making a Bill in Writing, the *Tenour* whereof was particularly set forth.

28 H. 6. *William de la Pool*. Sixth Article was, for Words spoken by him sitting in the Council in the *Star-Chamber*, viz. That he said, (he had a Place in the Council House of the *French King*, as he had here, and was as well trusted as he was here; and could remove from the *French King* the priviest Man of his Council if he would.)

1640.

Art. 4. 5. Lord *Finch*. The Opinions he delivered are set forth in *hac Verba*, as also the Times when he delivered them.

7. Another Opinion delivered by him in the *Exchequer Chamber*, and *Western Circuit*, is set down in his express Words.

1640.

Art. 11. Doctor *Cofens*. He is charged with Words delivered in a Sermon at *Durham*; the Words are these,

The Reformers, &c.

19. Charges him with Words in like Manner; the Words were these,

The King, &c.

1641.

Art. 1. *Berkeley*. The Words charged upon him are expressly mentioned.

4. & 5. That he subscribed an Opinion in *hac Verba*, which are specified.

6. The

6. The Matter therein charged, though of Record, was copied and delivered with the Articles.
- 7 & 8. The Words spoken, and the Place expressly set forth.
1641.
Art. 1. 2. 3. Judge *Crawley*. For subscribing and giving Opinions, set forth *in hæc Verba*.
1641. *Herbert*. For exhibiting Articles against the five Members, which Articles follow in these Words, &c.
1641. Thirteen Bishops impeached for making and promulging, in 1640, several Constitutions and Canons, contrary to the King's Prerogative, &c.
They demurred, because the Charge was general, but receded from this Demurer, because it appeared to be particular.
1641.
Art. 2. Earl *Strafford*. Expresses the Words spoken by him, and the Time.
4. 20. 21. 22. Express the very Words spoken by him.
23. 24. 25. Is in the like Manner with an *Inuendo* of his Meaning.
26. 27.
1642. Art. Archbishop *Laud*. Express the Words spoken by him.
1. 4. 10.
2. Expresses the Words spoken by him, and the Time and Place.

So necessary did the long Parliament itself think it, to pursue the Forms of Law in all their Prosecutions.

Upon the whole, therefore, we conceive, that so great a Number of Precedents is sufficient to outweigh the single Instance of Doctor *Manwaring's* Case, how apposite soever it may seem to be to the present Case, which, for the Reasons we have mentioned, is far from being plain and clear, or having the full Authority of a Precedent; and the Law and Custom of Parliament, as we conceive, is to be determined by constant Course and Practice, and not one Precedent, occasioned by such odious Doctrines as those of Doctor *Manwaring's*; nor can the contrary Assertion to the abovesaid Resolution be of any ill Consequence to Impeachments by the Commons, because it is easy for them to specify the Words which offend them, but extremely difficult for the accused to defend himself without knowing them;

them; and as all, who are charged criminally, have Leave to make their Defence, so they should also have allowed them all lawful Means for it.

<i>Jo. Ebor.</i>	<i>Scarborough,</i>	<i>Abingdon.</i>
<i>Scarsdale,</i>	<i>Conway,</i>	<i>North and Grey,</i>
<i>Beaufort,</i>	<i>H. London,</i>	<i>Osborne,</i>
<i>Berkshire,</i>	<i>Thanet,</i>	<i>N. Duresme,</i>
<i>Plymouth,</i>	<i>Northampton,</i>	<i>Stawell,</i>
<i>Denbigh,</i>	<i>Willoughby de Broke,</i>	<i>Lempster,</i>
<i>Rocheſter,</i>	<i>Howard,</i>	<i>Leeds,</i>
<i>W. Ceſtriens',</i>	<i>Suffex,</i>	<i>Angleſey,</i>
<i>Guilford,</i>	<i>Ferrers,</i>	<i>Jerſey,</i>
<i>Guernſey,</i>	<i>Yarmouth,</i>	<i>Craven.</i>
<i>Nottingham,</i>	<i>Weymouth,</i>	

By Stat. 8 Rich. 2. c. 4. "If any Judge be convicted of falſely entering of Pleas, *raſing* of Rolls, or changing of Verdicts, he ſhall be puniſhed by Fine and Ransom at the King's Will, and ſatisfy the Party."

Lord (a) *Coke* obſerves, that it is not material whether the Act be done, either before or after Judgment, ſo Judgment be given.

The Judges ought to remember, that their (b) Office is *Jus dicere*, and not *Jus dare*; that is, to *interpret*, not to *make* Law; but if they will exceed their Authority, they may be complained of in the Committee of Courts of Juſtice, which Committee is always appointed, at the Meeting of Parliament, for the Redreſs of ſuch Grievances; and in Caſe the Judges are *there* found to have been deficient in their Duty, either by doing what they ought not to have done, or by reſuſing or omitting to do what the Law enjoins them to do, they may, in either Caſe, upon an Addreſs to the King from both Houſes of Parliament, notwithſtanding they hold their Offices for Life, be removed; for they can continue Judges only during their good Behaviour, as appears from the laſt (c) Act of the Legislature, concerning this Matter.

Part of the Preamble to this Act recites, that "His Maſteſty had been graciouſly pleaſed to declare from the Throne to both Houſes of Parliament, that he looked upon the Independency and *Uprightneſs* of Judges, as eſſential to the impartial Adminiſtration of Juſtice, as one

(a) 3 Inſt. 72.

(b) Lord Bac. 520.

(c) Stat. 1 Geo. 3. c. 23.

of the best Securities to the Rights and Liberties of his loving Subjects, and as most conducive to the Honour of his Crown."

L. C. J. (a) *Vaughan* says, "If any Man thinks, that a Person concerned in Interest, by the Judgment, Action, or Authority, exercised upon his Person or Fortune, by a Judge, must submit in all, or any of these, to the implied *Discretion* and *Uprightness* of his Judge, without seeking such Redress as the Law allows him, it is a Persuasion against common Reason, the received Law, and Usage both of this Kingdom, and almost all others."

By Stat. 8 Rich. 2. c. 4. "The Party grieved shall sue by Writ of Error, or otherwise, according to the Law, if he see it expedient for him, in order to obtain Restitution of his Inheritance taken from him, by a Judge (b) his making a false Entry, raising the Record, or changing the Verdict."

A Judge's Order, made out of Court, according to modern (c) Practice, at his House or Chambers, hath the Quality of an Act of Despotism, inasmuch as if it be illegal or oppressive, the Injury is incapable of Redress, because if a Writ of Error be brought, the Grievance, which is the Order, cannot be removed to the superior Jurisdiction for want of being recorded, consequently cannot be corrected, unless the Court below, where it hath had its Effect, be pleased to make it a Rule of Court, and return it with the Transcript of the Record on the Writ of Error, which it is said hath lately been desired and refused, though it is certain the principal End of recording Proceedings at Length in Courts of Justice, is to make the Redress of Errors practicable:

It is observable, however, that Sir *Fletcher Norton* (in the Continuation of his Argument for the Plaintiff, on the Commission in Error, in the (d) Cause of the Chamberlain of *London*, against the Attornies, touching the City's Right to oblige such of them, as practice Conveyancing in *London*, to be free of the Scrivener's Company) expressly says, that though the Matter in Favour of the Party "does not appear in the Record, their Lordships are to correct the Errors; and what is in the Law, is as much before the Court, as what is in the Record."

(a) *Vaugh.* Rep. 138. 139.

(b) 3 Inst. 72.

(c) But modern Practice (according to honest Judge *Powell*) cannot alter the old Law. 11 Mod. 88.

(d) P. 106. of the Report of those Proceedings.

ERRATA.

Page. Line.

- 52. 10. *for Tenor to Purport, read Purport to Tenor.*
- 55. 10. *for excessively, read illegally.*
- 34. *after which add a Comma.*
- 56. 8. *after amended add by Challenge of the Party, or otherwise.*
- 57. 29. *dele cer-*
- 59. Note (b) *for preserved read left open.*
for Body of the Work read Text.
after him add soundly.
- 60. In Notes *add Stat. 5 Geo. c. 13. Sect. 2.*

ERRATA.

C O U R T
O F
S T A R - C H A M B E R .

ST. ALBANS M.B.R.

A N
I N Q U I R Y
I N T O T H E
H I S T O R Y and A B O L I T I O N
O f t h e C O U R T o f
S T A R - C H A M B E R .
U P O N T H E
P R I N C I P L E S o f L A W , and t h e C O N S T I T U T I O N ,
P A R T I C U L A R L Y A S I T R E L A T E S T O
P R O S E C U T I O N S f o r L I B E L S .

W i t h N O T E S , R E F E R E N C E S , and O B S E R V A T I O N S .

B y a n E N G L I S H C R O W N L A W Y E R .

*The Proceedings, Censures, and Decrees of the Court of Star-Chamber
were, by Experience, found to be an intolerable Burthen to the Subject,
and the Means to introduce an arbitrary Power and Government.*

*The Legislature's Reasons for abolishing the Court.
See Stat. 16 Car. Chap. 10. Sect. 2.*

A N

INQUIRY, &c.

AS in the Government of all Commonwealths, sundry Things do fall out both in Peace and War, that do require an extraordinary Help, and cannot await the usual Cure of common Rule and settled *Justice*, the which is not performed, but altogether after one Sort, and that not without Delay of Help, and Dispense of Time: so albeit here within this Realm of *England*, the most Part of Causes in Complaint are, and ought to be referred to the ordinary Process and solemn Handling of common Law, that singular Distribution of *Justice*, yet have there always arisen, and there will continually, from Time to Time, grow some rare Matters meet for just Reason to be reserved to an higher Hand, and to be left to the Aid of *absolute Power*, and *irregular Authority*.

Such are the *constitutional* Reasons given by the learned (a) *Lambard*, for the original Institution of the Court of *Star-Chamber*; can there be a greater Prostitution of the Word *Justice*, than in calling *that* Court a *Court of Justice*, whose Decisions were the Result of *absolute Power* and *irregular Authority*?

(a) *Lamb.* Arch 88.

The Court of *Star-Chamber* is so called, (according to Sir *Thomas (a) Smith*) either because it is full (b) of Windows, or because at the first, all the Roof thereof was decked with Images of gilded (c) Stars. *Camden (d)* says, it had its Name of *Star-Chamber* ever since it was held in a Chamber of that Name, at *Westminster*, which had been long set apart for that Use; for in an (e) Act of Parliament in *Edward the Third's* Time, we find, *Conseil en le Chambre des Estoilles, pres de la Receipte at Westminster*; that is, The Council in the *Star-Chamber*, near the Receipt at *Westminster*.

Some have imagined that it was called (f) the *Star-Chamber*, because *Crimina (g) stellionat'* were there handled: others that it is derived of the Saxon Word *Steeran*, to steer or rule, as doth the Pilot, because this Court did steer and govern the Ship of the Commonwealth. But the true Cause of the Name is, because, as is aforesaid, the Roof is (h) starred. In all Records in Latin, it is called "*Camera stellata*."

Albeit (i) the Stile of the (k) Court of *Star-Chamber* be *coram Rege & Concilio suo*: (of ancient Time, *coram (l) Rege in Camera, &c.*) yet the King's Council of that Court heard and determined Causes there, and the King, in Judgment of Law, is (m) always in Court.

(a) Common-Welth of *England*. 118. 119. B. 3. Chap. 4. *Cowel Interpret. Verb.* "*Star-Chamber*."

(b) 4 *Inst.* 66. *Lamb. Arch.* 185.

(c) *Gibf. Camd. Brit.* ccliv. 4 *Inst.* 66. *Lamb. Arch.* 185.

(d) *Gibf. Camd. Brit.* ccliv.

(e) 41 *Edw.* 3. 4 *Inst.* 60. 65. *Lambard* says, that in the Roll of Patents de An. 2 *Rich.* Part I. Membr. 28. this Court hath the express Name of *Star-Chamber*. *Lamb. Arch.* 177. Mr. Justice *Barrington* seems mistaken in his Observation on Stat. 3 *Hen.* 7. c. 1. which is, that the Court of *Star-Chamber* is not mentioned to be held by that Name till 19 *Hen.* 7. c. 18. See *Bar. Observ. on Stat.* 347. Note (x).

(f) 4 *Inst.* 66.

(g) 3 *Lord Bac.* 35. *Lambard* says the Name of this Court was derived of the Latin Word *Stellio*, which betokeneth that starry and subtle Beast, of whose Name the Fault of crafty Cozenage is borrowed by the *Civilians*, which they call *Crimen stellionatum*, because the Sin is punished in this Court by an extraordinary Power, even as it was in the Law civil. *Lamb. Arch.* 184. See Post. 79. Note (e).

(h) But *Rushworth* says, that this Court was not called in our ancient Year Books *Camera stellata*, [*Star-Chamber*] because the Chamber, where the Court was kept, was adorned with Stars, but because it was the Seat of the *Great Court*, and the Name was given according to the Nature of the Judges thereof; *Denominatio* being *a præstantiori*, and *majus dignum trahit ad se minus*. *Rushw. Collect.* Part 2. Vol. I. P. 472.

(i) 4 *Inst.* 65.

(k) 4 *Inst.* 60.

(l) *Rushw. Collect.* Part 2. Vol. I. P. 473.

(m) The King did personally sit in Judgment with his Council in this Court. *Lamb. Arch.* 165. 180.

This Court was holden *coram Rege & Concilio*, and might be compounded of three several Councils. That is to say, of the Lords and others of his Majesty's Privy Council, always Judges without Appointment. The Judges of either Bench and Barons of the *Exchequer* are of the King's Council for Matter of Law, &c. and the two Chief Justices, or in their Absence, other two Justices were standing Judges of this Court. The Lords of Parliament are properly *De magno Concilio Regis*, but neither these, being not of the King's Privy Council, nor any of the Rest of the Judges or Barons of the *Exchequer* were standing Judges of this Court.

Camden (a) says, this Court was in Age the most ancient, for it seems to have been as early, as Appeals from the Subjects to their Sovereign, and was the Birth and Rise of the King's Council.

Sir *Henry* (b) *Spelman* says, it was in Lieu of that which was in ancient Time the *Counsel-Chamber*, and *Specula Regni*, the Watch Tower of the Kingdom.

Lord (c) *Coke* says, it was a Court in and before the Time of *Edward the Third*; and Lord (d) *Bacon* says, it subsisted by the ancient common Law of the Realm.

Lord (e) *Clarendon* says, that this Court was rather extended and confirmed, than (f) founded by the Statute of King *Henry the Seventh*: for, no Doubt, it had both a Being, and a Jurisdiction, before that Time, though vulgarly (g) it received Date from thence.

Cardinal (h) *Wolfey*, Archbishop of *York*, by some was thought to have first devised this Court, because that he, after some Interruption by Negligence of Time, augmented the Authority of it.

This Court of *Star-Chamber* was compounded of good (i) Elements, for it consisted of four Kinds of Persons, Counsellors, Peers, Prelates, and Judges; the Lord Chancellor (k) of *England*, the

(a) *Gibbs. Camd. Brit. ccliv. 4 Inst. 65.*

(b) Original of the Terms. 94. See *Rushw. Collect. Part 2. Vol. I. P. 473.*

(c) 4 *Inst. 63.*

(d) 3 *Lord Bac. 35.*

(e) *Clarend. Hist. Rebel. 223. Gibbs. Camd. Brit. ccliv. 4 Inst. 62.*

(f) *Rushworth* says it was not founded by this Act. *Rushw. Collect. Part 2. Vol. I. p. 473.* So said the whole Court of *King's Bench. Cro. Car. 168. pl. 14.*

(g) *Lamb. Arch. 185. S. P.*

(h) Sir *T. Smith. 120.*

(i) 3 *Lord Bac. 35.*

(k) Stat. 3 Hen. 7. c. 1. S. 1. 4 *Inst. 62. 65.* Sir *T. Smith. 118. 121. Gibbs. Camd. Brit. ccliv.* The Lord Chancellor presided; and if the Voices were equal, he gave the casting Vote. *Rushw. Collect. Part 2. Vol. I. p. 475. Bar. Observ. on Stat. 348.*

Lord Treasurer (*a*) of *England*, the Lord President (*b*) of the Council, the Lord Keeper of the Privy (*c*) Seal, and all of the King's (*d*) Council, whether Persons spiritual or temporal (*e*); also such of the parliamentary (*f*) Barons as the King thought fit to call; with the two Chief Justices, or two other Judges in their Absence (*g*).

These (*b*) used to meet *ad prospiciendam fovendamque Rempubicam*; to discover, prevent, and suppress all Dangers and Enormities occurring, and to provide for the Safety and Good of the Kingdom.

The (*i*) Number of Judges in the Reign of King *Henry the Seventh* and King *Henry the Eighth*, were near (*k*) forty at one Time, and thirty in the Reign of *Elizabeth* oft-times; but since much lessened. In King *Charles's* Time there were twenty-four and twenty-six (*k*) at a Time.

The Officers (*l*) of this Court were, three Attornies; an Examiner; a Clerk of the Writs (*m*), and of the Process of the Council of *Star-Chamber*; and an (*n*) Usher.

The Clerk (whom *Camden* (*o*) and Lord (*p*) *Coke* both say) was the Clerk of the Council, and the latter, that it was an Office of great Account and Trust, for he was to receive, endorse, enter, keep (*q*), and certify the Bills, Pleadings, Records (*q*), Rules (*q*), Sentences, and Decrees (*q*), of the Court; and his Lordship (*r*) finds, that in former Times Men of great Account had had that Office in this Court.

The three (*s*) Attornies were for the Plaintiff and for the Defendant to form their Complaints and Answers, and make their Matter apt to be heard for the Lords.

(*a*) *Gibf. Camd. Brit. ccliv. Stat. 3 Hen. 7. c. 1. S. 1. 4 Inst. 62. 65. Sir T. Smith. 121.*

(*b*) *Stat. 21 Hen. 8. c. 20. Gibf. Camd. Brit. ccliv. 3 Inst. 62. 65.*

(*c*) *4 Inst. 62. 65. Gibf. Camd. Brit. ccliv.*

(*d*) *Gibf. Camd. Brit. ccliv. Sir T. Smith. 118. 121. Sir H. Spelm. Original of the Terms. 94. Who were near forty in Henry the Seventh's Reign. Lamb. Arch. 181. Whitelock asserts, that every Privy Counsellor had a Voice in this Court. Whitel. Com. Parl. Writ. 94.*

(*e*) *Gibf. Camd. Brit. ccliv. 4 Inst. 65.*

(*f*) *4 Inst. 65. Gibf. Camd. Brit. ccliv. Sir T. Smith. 118. 121. Sir H. Spelm. Original of the Terms. 94.*

(*g*) *Gibf. Camd. Brit. ccliv. Sir T. Smith. 118. 4 Inst. 62. 65. Stat. 3 Hen. 7. c. 1. S. 1.*

(*h*) *Sir H. Spelm. Original of the Terms. 94. 95.*

(*i*) *Rushw. Collect. Part 2. Vol. I. P. 475.*

(*k*) *Bar. Observ. on Stat. 348.*

(*l*) *Sir T. Smith. 121.*

(*m*) *Gibf. Camd. Brit. ccliv. Lamb. Arch. 189.*

(*n*) *Lamb. Arch. 188.*

(*o*) *Gibf. Camd. Brit. ccliv.*

(*p*) *4 Inst. 66.*

(*q*) *Sir T. Smith. 121.*

(*r*) *4 Inst. 66.*

(*s*) *Sir T. Smith. 121. Lamb. Arch. 189.*

The Examiner (a) took the Depositions of the Witnesses on both Sides, to the Proof or Disproof of the Cause.

The (b) Usher kept the Room, proclaimed Silence, called over the Names, and other base Services.

The Messengers of this Court were the Warden (c) of the *Fleet*, or the Serjeant at Arms (d); which last bore the Lord Chancellor's Mace, and arrested and brought into Court, such as he was commanded (e).

The Court of *Star-Chamber* was the most honourable (f) Court (our Parliament excepted) in the Christian World, both in Respect of the Judges of the Court, and of their honourable Proceeding, according to their just Jurisdiction, and the ancient and just Orders of the Court. And it is truly said, *Curia Camerae stellatae, si Dignitatem spectemus est* (g) *honoratissima*; i. e. if we consider the Dignity thereof, it is most honourable. This Court, the right Institution and ancient Orders thereof being observed, did keep all *England* in Quiet. Lord (h) *Bacon* gives it the Character of one of the sagest and noblest Institutions in the Kingdom.

Such a Composition was this Court (says (i) another) for Justice, Religion, and Government, as may be well and truly said (whilst so great a Court and Presence kept within (k) their Bounds) *Mercy and Truth were met together*.

Whilst this Court was gravely and moderately governed, (says Lord (l) *Clarendon*) it was an excellent Expedient to preserve the Dignity of the King, the Honour of his Council, and the Peace and Security of the Kingdom.

For the Dignity of this Court (m), I find it's said, that since the great *Roman Senate*, so famous to all Ages, as that they were called

(a) Sir T. Smith. 121.

(b) Lamb. Arch. 188. 189.

(c) Russw. Collect. Part 2. Vol. I. P. 473. 474.

(d) Sir T. Smith. 122.

(e) Lamb. Arch. 189.

(f) 4 Inst. 65. See Lamb. Arch. 217.

(g) Gibb. Camd. Brit. ccliv.

(h) 2 Lord Bac. 35. The Honourable Mr. Justice Barrington, in Allusion to this Passage, observes, that Lord Bacon, in his History of *Henry the Seventh*, speaks highly of this Court and its Powers, he will not cite his Words; as he was so great an Ornament to Humanity, that his Failings should not be dwelt upon, but only mentioned as a Proof, that he was but Man. Bar. Observ. on Stat. 347.

(i) Russw. Collect. Part 2. Vol. I. P. 475.

(k) Which they so seldom did, that the Court was abolished.

(l) Clarend. Hist. Rebel. 223.

(m) Russw. Collect. Part 2. Vol. I. P. 474.

pro Jure miraculum Orbis, there did no Court come so near them in State, Honour and Judicature; the Judges of this Court were surely, in Honour, State and Learning, for Understanding, Justice, Piety, and Mercy, equal, and in many of them exceeding the *Roman Senate*, by so much as Christian Knowledge exceedeth human Learning.

Nor did this Court at any Time want a *Cicero* or *Hortensius*, to make a Defence for such as were there accused; nor was there any Bar of Pleading which afforded so large a Scope to exercise a good Orator, the usual Subject being the Defence of Honour and Honesty. But Chancellor *Elsmere* affecting Matter rather than Words, tied the same to laconical Brevity; an Honour to a Court of Justice, to be swayed rather by ponderous Reasons, than fluent and deceitful Speech.

It was not the least Honour and Dignity to this Court, that the Sentences and Judgments of the same were not the Opinion of any private Person, but the Judgment of many noble, wise, and learned Men conjoined together; so that it was a Topick Rule for Assurance of Truth.

* Another Manifestation of the Dignity of it was, that the Proceedings of it were *tam lento Pede*, without Precipitation, but gave Time to the Defendant to defend or excuse himself, both in producing Testimony, and in making Defence at the Bar. And that it took hold in Judgment only of direct Proofs, speaking Circumstances, or more than probable Presumptions, and those not single but double; which caused the Judgment thereof to be esteemed worthily, like the Laws of the *Medes* and *Persians*, irrevocable. Besides the Reasons of the Sentence were succinctly collected and knit together, and sagely delivered, by grave, learned and notable Personages, whose very Countenances added Weight to their Words, and who tied themselves to Certainty, and not to conjectural Proofs.

The Court of *Star-Chamber*, (says a late (a) learned (b) Writer, who was advanced to the highest Post in the Law in a neighbouring Kingdom to that of our Mother Country, and wherein he died) whilst (c) kept within (d) due Bounds, was certainly of the greatest Use to preserve the Peace and Security of the Kingdom; and perhaps was the only Court which by its ordinary and proper Jurisdiction, could

(a) Dig. Lib. 104.

(b) *Richard West*, Lord Chancellor of Ireland, from June 1. 1725. 11 Geo. to 21 December 1727. 12 Geo. Har. Hist. Ir. 116. Chap. 15.

(c) Disc. Treas. and Attaind. 94.

(d) Which the Court so seldom did, that it was abolished.

effectually

effectually prevent and punish Riots, Perjuries, and other Misdemeanors of the highest Nature.

The Court of *Star-Chamber* took (a) Cognizance of all Matters criminal; as for (b) Oppression, and other exorbitant Offences of great Men, (whom inferior Judges and Jurors (though they should not) would in respect of their Greatness be afraid to offend) Bribery, Extortion, Maintenance, Champerty, Imbracery, Forgery, Perjury, Dispersers of false and dangerous Rumours, News, and scandalous Libelling, false and partial Misdemeanors of Sheriffs and Bailiffs of Liberties, Frauds, Deceits, great and horrible (c) Riots, Routs, and unlawful Assemblies, single Combats, Challenges, Duels, and other heinous and extraordinary Offences and Misdemeanors; but ordinary, and such Offences as might be sufficiently and condignly punished by the Proceeding of the common Law, this Court left to the ordinary Courts of Justice, and dealt not with them, *ne Dignitas hujus Curiae vilesceret*.

It discerned (d) principally of Force, Crimes various of (e) stellationate, and the Inchoations or middle Acts towards Crimes capital or heinous, not actually committed or perpetrated; but that which was chiefly aimed at by Stat. 3 Hen. 7. c. 1. was Force, and the two chief Supports of Force, Combination of Multitudes, and Maintenance or Headship of great Persons. Seeing the Proceeding according to the Laws and Customs of this Realm cannot by one Rule of Law suffice to punish in every Case, the Exorbitancy and Enormity of some great horrible Crimes and Offences, and especially of great Men, this Court (f) dealt with them, to the End that the Medicine might be according to the Disease, and the Punishment according to the Offence, *Ut Pœna ad paucos, Metus ad omnes perveniat*, without respect of Persons were they public or private, great or small.

This Court (g) took great Augmentation and Authority at the Time that Cardinal *Wolsey*, Archbishop of *York*, was Chancellor of *England*, which was at that Time marvellous necessary to do, to

(a) *Gibf. Camd. Brit.* ccliv.

(b) 4 Inst. 63.

(c) Sir *Tho. Smith's* Common-Welth. 122.

(d) 3 Lord *Bac.* 35.

(e) Stellationate is a mere *civil* Law Term, denoting all Frauds for which there is no particular Denomination, and several Kind of Frauds are punished *criminaliter* by that Law under the Name of *Stellationate* that are not liable to any criminal Prosecution by the Law of *England*. See ante, P. 74. Note (g).

(f) 4 Inst. 63.

(g) Sir *T. Smith's* Common-Welth. 120.

repress the Insolence of the Noblemen and Gentlemen of the North Part of *England*, who being far from the King and the Seats of Justice, made almost as it were an ordinary War among themselves, and made their Force their Law, banding themselves with their Tenants to do, or revenge Injuries one against another, as they listed (a).

This seemed not supportable to the noble Prince *Henry the Eighth*, who sending for them one after another to this Court to answer, after they had had Remonstrance shewn them of their evil Demeanor, and been well disciplined as well by Words, as by fleeting awhile, and thereby their Purse and Courage somewhat asswaged, they began to range themselves in Order, and to understand that they had a Prince who would rule his Subjects by his Laws and Obedience.

The (b) Jurisdiction of this Court dealt not with any Offence, that was not *malum in se*, against the common Law, or *Malum prohibitum* against some (c) Statute. Divers special (d) Acts of Parliament gave Jurisdiction to this Court.

There (e) was always reserved an high and preeminent Power to the King's Council, in Causes that might in Example or Consequence concern the State of the Common-Wealth; which if they were criminal the Council used to sit in the Chamber called the *Star-Chamber*. And the Court could not sit for hearing of Causes under the Number of eight at the least (f).

This Court sat twice in the Week in the Term Time, viz. on *Wednesdays* and *Fridays*, from *nine* till *eleven* o'Clock in the Morning (g), except either of those Days fell out to be the first or last Day of the Term, and then the Court sat not, but it constantly held the next Day after the Term ended: but if any Cause was begun to be heard in Term Time, and for Length or Difficulty could not be sentenced within the Term, it might be continued and sentenced after the Term.

This (h) Court in ancient Times sat but rarely, for three Causes. First, for that enormous and exorbitant Causes which this Court

(a) See *Lamb. Arch.* 205. 216.

(b) 4 *Inst.* 63.

(c) And yet in 4 *Rep.* 16. b. pl. 10. it is said, that the Court of *Star-Chamber* could punish by their absolute Power which was not punishable by the ordinary Course of the Law. *The Reporter would have us observe well the Reason of this Resolution.*

(d) Viz. Stat. 2 *Rich.* 2. c. 5. 12 *Rich.* 2. c. 11. 13 *Hen.* 4. c. 7. 33 *Hen.* 8. c. 1. 4 & 5 *P. & M.* c. 8. 5 *El.* c. 9. 10. 14 27 *El.* c. 4. See these Acts. *Sir T. Smith.* 122. & *Crompt. Jurisdic. of Courts.* 30. b.

(e) 3 *Lord Bac.* 35.

(f) 4 *Inst.* 65.

(g) *Sir T. Smith's Common-Wealth.* 118.

(h) 4 *Inst.* 61.

Court dealt withall only, in those Days rarely fell out. Secondly, this Court dealt not with such Causes, as other Courts of ordinary Justice might condignly punish, *ne Dignitas hujus Curiae vilesceret*, as before is said. Thirdly, it very rarely did sit, lest it should draw the King's Privy Council from Matters of State, *pro Bono publico*, to hear private Causes, and the principal Judges from their ordinary Courts of Justice.

But Sir Henry (a) *Spelman* says, it was necessary that this Session should not only be *daily* open, but (as it is said of the House of Fame) *Nocte Dieque patens* (b); for an Evil may happen in the Night, that would be too late to prevent in the Morning; and therefore the Statute of Henry the (c) *Seventh*, or of Henry the (d) *Eighth*, enlarging the Jurisdiction thereof, did not circumscribe it either within Term Time, or Days of Sitting.

Rushworth (e) says, it was a glorious Sight upon a Star Day, when the Knights of the *Garter* appeared with the Stars on their Garments, and the Judges in their Scarlet; in which Posture they sate sometimes from nine in the Morning till five in the Afternoon, before every one had done speaking their Minds in the Cause that was before them.

The (f) Process of this Court was *Subpœna*, Attachment, Proclamation of Rebellion, and a Commission of Rebellion; all under the Great Seal (g).

The Proceedings (h) in this Court (i) were by Bill or Information, by Examination of the Defendant upon Interrogatories, and by (k) Examination of Witnesses, and rarely *Ore tenus*, upon the Confession of the Party in Writing under his Hand, which he was again freely to confess in open Court, upon which Confession in open Court, the Court did proceed. But if his Confession was set

(a) In his Original of the Terms. 95.

(b) *Ovid's Metamorph.* B. 12. L. 45.

(c) 3 Hen. 7. c. 1.

(d) 21 Hen. 8. c. 20.

(e) *Rushw.* Collect. Part 2. Vol. 1. P. 473.

(f) Sir T. Smith's Common-Welth. 122. *Crompt.* Jurisdic. 29. a.

(g) 4 Inst. 66. But previous to this the Defendant was summoned, or called in, either by Writing, or Messenger; by Writing, as by the King's own Letter; or by his *Privy Seal*, directed under a Pain to the Party's Self, or to the Sheriff, to take Sureties for his Appearance, or by Letters missive from the Counsel; and if he made Default, then upon Affidavit made, by an Attachment and Proclamation of Rebellion, if the Case required it. *Lamb. Arch.* 186.

(h) A Scottish Historian of some Veracity says, that all the Proceedings in this Court were arbitrary. 5 Hume 25.

(i) 4 Inst. 63.

(k) *Lamb. Arch.* 187.

down too short, or otherwise than he meant, he might deny it, and then they could not proceed against him but by Bill or Information, which was the fairest Way.

The Informations, Bills, Answers, Replications, &c. and Interrogatories were in *English*, and ingrossed on Parchment, and filed up. All the Writs and Process of the Court were under the Great Seal: the Sentences, Decrees and Acts of this Court were ingrossed in a fair Book, with the Names of the Lords and others of the King's Council and Justices that were present and gave their Voices.

The Order (*a*) of proceeding to Judgment was by Assent of Voices, and open yielding their Mind in Court, the major Part being preferred for Sentence.

Causés in this Court were not tried *per Pares*, according to the common Law, but after the Method of the civil Law (*b*); upon Confession or Deposition of Witnesses (*c*); a Course which was never before permitted by the common Law of the Realm, wherein no Trial was allowed, but that only *per legale Judicium Parium*, as the Great Charter itself plainly doth acknowledge (*d*).

Among the Records touching ancient Proceedings in this Court, is the following; to wit,

Trin: 8 Eliz.

(*e*) Ordinances for Reformation of Disorders in printing and selling of Books.

To elucidate this Matter I shall set forth Stat. 3 Hen. 7. c. 1. whereby it is ordained, that the Chancellor and Treasurer of *England*, and the Keeper of the King's Privy Seal, or two of them, calling to them a Bishop and a temporal Lord of the King's most honourable Privy Council, and the two Chief Justices of the *King's Bench* and *Common Pleas* for the Time being, or other two Justices in their Absence, upon Bill or Information (*f*), put by the said Lord Chancellor or any other against any Person for unlawful Maintenance, giving of

(*a*) Sir T. Smith's Common-Welth. 121. Lamb. Arch. 188.

(*b*) Gibb. Camd. Brit. ccliv.

(*c*) 4 Inst. 65.

(*d*) Lamb. Arch. 204. 205.

(*e*) Rushw. Collect. Part 2. Vol. I. P. 478.

(*f*) The whole Doctrine of Libels, and the criminal Mode of prosecuting them by Information, did originate in this accursed Court.

Liveries,

Liveries, Signs and Tokens, and Retainers by Indentures, Promises, Oaths, Writings, or otherwise, Imbraceries of his Majesty's Subjects, untrue demeaning of Sheriffs in making of Pannels, and other untrue Returns by taking of Money, by (a) Juries, by great Riots, and unlawful Assemblies, have Authority to call before them by Writ or Privy Seal the said Misdoers, and they and others by their Discretion, by whom the Truth may be known to examine, and such as they find therein defective, to punish them after their Demerits, after the Form and Effect of Statutes thereof made, in like Manner and Form as they should and ought to be punished if they were thereof convicted after the due Order of Law.

Lord Coke, after having treated of the Court of *Star-Chamber*, and set forth this Statute, from the whole draws six Conclusions, whereof the fourth is this. (b) Fourthly, this Act in one Point is introductory of a new Law, which the former Court had not, viz. to examine the Defendant, which being understood after his Answer made, to be upon Oath upon Interrogatories, which this ancient Court proceeding in criminal Causes had not, nor could have but by Act of Parliament, or Prescription, the Want whereof, especially in Matters of Frauds and Deceits, (being like Birds closely hatched in hollow Trees) *was a Mean that Truth could not be found out*; but before the Statute the Answer was upon Oath.

This Act expressly acknowledges that the Persons who should be punished by Force of it were not to be convicted after the due Order of Law; and as the Safety of the Subject requires that they be convicted only according to the due Order of Law, Innocence of the Crime being insufficient to secure the Party accused when a Departure from the due Course of Law takes Place in the Proceedings, it may be said, in my Opinion, to have borne Testimony against itself. Lord Coke takes no Notice of this Part of the Act, nor that the Course of judicial Proceedings established by it was inconsistent with the great Charter, which, in the Proeme to his Commentaries thereon, he had before observed had been confirmed, established and commanded to be put in Execution by thirty-two several Acts of Parliament; but favouring the new Law thereby introduced, which

(a) I have followed the Punctuation in the common Editions of the Statutes; it should, however be printed, "by taking of Money by Juries." It is well known that in Records there is no Punctuation, and perhaps the Statutes should be so printed, as the wrong Idea arising from improper Punctuation is not easily removed. *Bar. Observ. on Stat. 347. Note (y).*

(b) 4 Inst. 63.

gave Power to the Judges appointed by the Act, according to their Construction, to examine the Defendant after his Answer made, upon Oath upon Interrogatories, at their Discretion, he assigns a Reason for giving this Power, which respects all the Offences committed to their Cognizance, though more especially Frauds, to wit, that *the Want of it was a Mean that Truth could not be found out*. After making this Act, the Party accused, instead of being tried by his Peers, on Presentment or Indictment, and convicted upon lawful Evidence, the Witnesses appearing personally in open Court, and giving their Testimony *vivâ Voce*, subject to that occasional and free Examination which best discovers the Truth, was not only liable to be tried by the Judges thus appointed, on a bare Information, by the written Deposition of Witnesses, made on Examination upon Interrogatories out of Court; but moreover compellable by Fine and Imprisonment, to give Evidence against himself, contrary to the excellent Maxim of our Constitution, *nemo tenetur seipsum prodere*, 3 *Bulstr.* 50. *no Man is obliged to betray himself*; and it appears to me somewhat extraordinary, that Lord Coke should thus far approve of this compulsory Power, especially considering what he himself had before said concerning *Magna (a) Charta*, which provides, that no Freeman shall be condemned, but by the lawful Judgment of his Peers, nor passed upon, but by the Law of the Land, that is, by the due Course and Process of Law. Against this ancient and fundamental Law, and in the Face thereof, I find (says Lord (b) Coke) an Act (c) of Parliament made, that as well Justices of Assizes as Justices of Peace (without any finding or Presentment by the Verdict of twelve Men) upon a bare Information for the King before them made, should have full Power and Authority by their Discretions to hear and determine all Offences and Contempts committed or done by any Person or Persons against the Form, Ordinance and Effect of any Statute made and not repealed, &c. By Colour of which Act, shaking this fundamental Law, it is not credible what horrid Oppressions and Exactions, to the undoing of infinite Numbers of People, were committed by Sir Richard Empson, and Edmund Dudley, being Justices of the Peace, throughout *England*; and upon this unjust and injurious Act (as commonly in like Cases it falleth out) a new Office was erected, and they made Masters of the King's Forfeitures.

(a) Stat. 9 Hen. 3. c. 29.

(b) 2 Inst. 51.

(c) Stat. 11 Hen. 7. c. 3.

But

But at the Parliament holden (continues Lord Coke) in the first Year of *Hen. 8. c. 6.* this Act of *11 Hen. 7.* is recited, and made void, and repealed, and the Reason thereof is yielded, for that by Force of the said Act, it was manifestly known, that many sinister and crafty, feigned and forged Informations had been pursued against diverse of the King's Subjects, to their great Damage, and wrongful Vexation: and the ill Success hereof, and the fearful Ends of these two Oppressors, should deter others from committing the like, and should admonish Parliaments, that instead of this ordinary and pretious Trial *per Legem Terræ*, they bring not in absolute and partial Trials by Discretion. This Passage, by the Way, is submitted to the Consideration of the Promoters of Excise Laws.

Lastly, (a) it remaineth to be seen what Jurisdiction this Court had in (b) Punishment, and where, and in what Cases this Court might inflict Punishment by Pillory, Papers, Whipping, Loss of Ears, Stigmata in the Face, &c. (for it extended not to any Offence, which concerns the Life (c) of Man or Obtruncation of any Member, the Ears only excepted, and those rarely and in most heinous and detestable Offences.) But herein the surest Rule is, that seeing it was an ancient Court, the Precedents of the Court were to be followed, and the rather for that the Court consisted of such learned and honourable Judges. And Novelties without Warrant of Precedents are not to be allowed: generally some certain Rules are to be followed, where no Precedents are extant in the Case. *Quod Arbitrio Judicis relinquitur, non facile trahit ad Effusionem Sanguinis*: for general Acts of Parliament, which inflict Punishment, viz. *sur Forfeiture de Corps, & de avoir, &c.* These are expounded not to extend to Life, or Member, but to Imprisonment, &c.

(d) *Majore Pænâ affectus, quam Legibus statutum est, non est infamis.*

Pæna gravior ultrâ Legem posita, Æstimationem conservat.

(a) 4 Inst. 66.

(b) Offences were in none other Degree to be punished in this Court then, than they had been before upon Conviction by Judgment, and the Trial of twelve. *Lamb. Arch. 206.*

(c) Lord Bacon confirms this; for he says, the Court of *Star-Chamber* had the censorian Power for Offences under the Degree of capital. 3 Lord Bac. 35.

(d) 4 Inst. 66.

(a) *Confessus in Jure pro judicato habetur, cum quodammodo suâ Sententiâ damnatur.*

Cum confitente Spontè, mitius est agendum.

In Curia Cameræ stellatæ non agitur de Delictis ordinariis, ne Dignitas Curie vilescit.

Quicquid Judicis Authoritati subjicitur, Novitati non subjicitur.

The Translation and Application of, and Inferences from these Maxims, must be supplied by the intelligent Reader.

Sir Thomas (b) Smith says, the Punishment most usual was Imprisonment, Pillory, Fine, and many Times both Fine and Imprisonment.

Archbishop (c) Whitgift did constantly in this Court maintain the Liberty of the *free Charter*, that none ought to be fined but *salvo Contenemento*; he seldom gave any Sentence, but therein did mitigate in something the Acrimony of those that spoke before him; but the slavish Punishment of Whipping, &c. was not heard to come from the noble Spirits in those Times sitting in that honourable Presence.

When once this Court began to swell big, and was delighted with Blood which sprung out of the Ears and Shoulders of the punished, and nothing would satisfy the Revenge of some Clergymen but cropt Ears, slit Noses, branded Faces, whipped Backs, gagged Mouths, and withal to be thrown into Dungeons, and some to be banished not only from their native Country to remote Islands, but by Order of this Court to be separated from Wife and Children, who were by their Order not permitted to come near the Prison where their Husbands lay in Misery, then began the *English Nation* to lay to Heart the slavish Condition they were like to come unto, if this Court continued in its Greatness.

Upon the Prosecution of (d) John Lilburne, we find the Court of *Star-Chamber*, in manifest Derogation of the legislative Authority of the Kingdom, and in open Violation of the Rights of the Subject, making Laws restrictive, or rather subversive of civil and religious

(a) 11 Rep. 30. a. 4 Inst. 66.

(b) Common-Welth. 121.

(c) *Rushw. Collect.* Part 2. Vol. I. P. 475.

(d) See *Lilburne's Case*, ante P. 27.

Liberty,

Liberty, with severe penal Sanctions, according to their sovereign Will, subjecting Offenders against them to Punishments at the *Discretion* of this Court, without Limitation of Nature or Number.

On the Hearing before the Lords, upon *Lilburne's* Appeal to them, against his Censure in the *Star-Chamber*, and his Imprisonment, it was said,

That (a) Imprisonment is a Man buried alive, made *Corpus im-moblie Legis*, the immoveable Subject of the Law. There is an End when Life is taken away, but in this no End. *Nondum tibi cedit in Gratiam*, to put a Man out of his Pain was accounted a Favour by the *Romans*.

Close Imprisonment was never used to the Primitive Christians by any Tyrant; such Imprisonment may presume a Famishment, and so Death. The *Romans* had four Punishments, *Lapidatio*, *Combustio*, *Decollatio*, and *Strangulatio*, but never famishing to Death. *Lilburne* might have been so, as it was sworn.

Three Years Imprisonment till the Parliament released him, and might otherwise have been for ever.

Whipping was painful and shameful, Flagellation for Slaves. In the *Eleventh* of *Elizabeth*, one *Cartwright* brought a Slave from *Russia*, and would scourge him, for which he was questioned; and it was resolved, that *England* was too pure (b) an Air for Slaves to breath in. And indeed it was often resolved, even in the *Star-Chamber*, that no Gentleman was to be whipped for any Offence whatsoever; and *Lilburne's* Whipping was too severe.

Now as to his Whipping, observe the Distance from the *Fleet* to *Westminster* is about a Mile, that he had 500 Blows (one swears a great many more) with a terrible corded Whip with Knots upon it.

Among the *Romans* no Malefactor had above 40 Stripes, and with three Thongs; and *St. Paul* received but 39 Stripes, which was but 13 Blows. And it is worth the Observation, that not long since, at *Orleans* in *France*, a *Priest* was sentenced to be whiped for Fornication with a poor Maid, telling her, that *St. Francis* would come and lie with her such a Night, at which Time he feigned himself to be *St. Francis*, and was taken in Bed with her. The King's Advocates pressed the Judges, that he might receive

(a) *Rusbw. Collect.* Part 2. Vol. I. p. 468. 469.

(b) See *Anc. Dial. Excheq.* 28. a. *Bar. Observ. on Stat.* 196. *Black. Com.* 411. 2 *Salk.* 666. pl. 2. 2 *Lord Raym.* 1274. *Burn's Eccles. Law.* 84. 85.

14 Blows with a three corded Whip; but the Judges would not sentence him to more than 13 Blows, because *ampliandi sunt Favores*; but if our Arithmetick be right, (not to sport with his Pain) *Lilburne* had by this Numeration, three times five hundred Stripes in 500 Blows.

That this Punishment of the Pillory was first invented for Mountebanks and Cheats, that having gotten upon Banks and Formes to abuse the People, were exalted in the same kind to be set upon the Pillory, an open Shame to the Multitude.

Gagging is barbarous, and beastly; for Man differs from Beasts both *Ratione* and *Oratione*.

So that to sum up *Lilburne's* Sufferings, by Imprisonment he was made a dead Trunk; by Whipping a Rogue; by Pillory a Cheat; and by Gagging a Beast. They had better have hanged him outright, &c.

All these Punishments were inflicted, *for refusing to take an Oath to answer Interrogatories.*

Lord (a) *Clarendon* asked to what Purpose served the Statutes of *Magna Charta* and the Petition of Right, if People might be fined and imprisoned without Law, according to the *Discretion* of Commissioners? By *Magna Charta* (continued his Lordship) all Proceedings should be *per legale Judicium Parium, & per Legem Terræ*; now these Jurisdictions tell you, you shall proceed according to your *Discretion*; that is, you shall do what you please; only that we may not suspect this *Discretion* will be gentler and kinder to us than the Law, special Provision is made, that no Fine, no Punishment shall be less than by Law is appointed; by no Means, but as much greater as your *Discretion* shall think fit: and indeed in this Improvement we find arbitrary Courts are very pregnant: If the Law require my good Behaviour, this *Discretion* makes me close Prisoner; if the Law sets me upon the Pillory, this *Discretion* orders me to leave my Ears there. *How far what is here said of Discretion may be applied to the Court of Star-Chamber is obvious.*

What further Severities this *Discretion* dictated may in some Measure be seen in Chap. xxvi. of "A Digest of the Laws concerning Libels;" wherein is contained a chronological Series of Punishments for Libels, from the Time of King *Edward the Third*, to that of *George the Third*, both inclusive.

(a) In his Speech as Manager for the Commons, in a Conference with the Lords, held 22 Apr. 1640. 15 Car. 1. for abolishing an unconstitutional and oppressive Court subsisting in the North, called "The Court of the President and Council of the North," or, as it was more usually styled "The Court of York." This same Year the Court of *Star-Chamber* was abolished by Act of Parliament. See *Rushw. Collect.* Part 2. Vol. I. P. 162.

By the *Star-Chamber* Reports, it appears, that (a) Prosecutions raged with uncommon Fury against the Authors, Printers, Publishers, and Venders of Libels, that the Law of Libels was ransacked every Term, that the Loss of Ears, perpetual Imprisonment, Banishment, and (b) Fines of ten and twenty thousand Pounds were the common Judgments in that Court; and that the Crown assumed an uncontrollable Authority over the Press.

A modern female Historian hath the following spirited Remarks on the severe and cruel Punishments of the *Star-Chamber*.

It is plain (says (c) she) that heavy Fines, long Imprisonment, and those ignominious Punishments of Whipping and the Pillory, for writing Libels, are contrary to Statute Law; that they are inconsistent with Liberty is obvious; since it is incongruous to the Privileges of a Freeman, to be subject to these slavish Corrections, for other than for Crimes that debase his Nature as a Man: the Constitution of this Country hath never been purged from the Venom with which it was infected by the Erection of the *Star-Chamber*: its infamous Doctrine and servile Discipline have, in many Instances, been adopted in the Courts of common Law.

Upon the whole, it is much to be questioned, whether any infamous or severe Punishment can at this Day be *legally* inflicted on a *Libeller*, for the Court of *Star-Chamber* was abolished, because it exceeded all Limits, and inflicted heavier Punishments than by any Law were warranted; and since that Time, it was one of the Complaints in the Bill (d) of Rights that excessive Fines had been imposed, and illegal and severe Punishments inflicted.

The Court of *Star-Chamber*, in the Beginning of the Reign of *Charles the First*, by condemning the Parties accused of light Offences in exorbitant Fines to the King's Use, was become a Terror even to the Great; and by their proceeding from Time to Time without just Regard to the Nature of the Offence, or of the Evidence produced to prove it, they continued a Grievance, until the

(a) Dig. Lib. 42.

(b) In the Time of *Charles the First*, the Fines were often so severe, that the Audience assembled to procure Places at three o'Clock in the Morning, from the same Motive that there is the greatest Crowd about the Table, where the Play is deepest. *Bar. Observ. on Stat. 348.* *Russworth* says, it was usual for those who came to be Auditors at the Sentence given in weighty Causes to be there at three in the Morning, to get convenient Places and Standing. *Russw. Collect. Part 2. Vol. 1. P. 473.* *Quere* the Reason of the *welch* Judge's Observation?

(c) 2 *Macaul. Hist. Engl. 248.* in Notes.

(d) Stat. 1 W. & M. Sess. 2. c. 2.

Amplitude and Multiplicity of their Oppressions caused the Dissolution of this Court; the Necessity whereof may be farther evinced from Lord *Clarendon*, who, after taking Notice that Projects of all Kinds, many ridiculous, many scandalous, all very oppressive, were set on Foot; and mentioning Ship Money with others, writes thus. For (a) the better Support of these extraordinary Ways, and to protect the Agents, and Instruments, who must be employed in them, and to discountenance, and suppress all bold Enquiries, and Opposers, the Council Table and *Star-Chamber* enlarged their Jurisdictions to a vast Extent, holding (as *Thucydides* said of the *Athenians*) for honourable, that which pleased, and for just, that which profited; and being the same (b) Persons in several (b) Rooms, grew both Courts of Law to determine Right, and Courts of Revenue to bring Money into the Treasury; the Council-Table by Proclamations enjoining to the People what was not enjoined by the Law, and prohibiting that which was not prohibited; and the *Star-Chamber* censuring the Breach, and Disobedience to those Proclamations by very great Fines, and Imprisonment; so that any Disrespect to any Acts of State, or to the Persons of Statesmen, was in no Time more penal, and those Foundations of Right, by which Men valued their Security, to the Apprehension and Understanding of wise Men, never more in Danger to be destroyed.

Could *Selden*, *Milton*, or Colonel *Titus*, in stronger Terms describe the despotic Domination exercised over the People of *England*, and enforced by the Court of *Star-Chamber*, or can it now be said, that this, the chief Engine of lawless Dominion, was not become fit for Excision, or that its Doctrines, Decrees, and Proceedings, were worthy of perpetual Imitation, Force, and Obligation?

Lord *Clarendon* gives the following Account of the Proceedings in Parliament for abolishing this Court.

A (c) Bill for taking away the *Star-Chamber* Court: The Progress of which Bill was this. The Exorbitances of this Court had been such (as hath been before touched) that there were very few Persons of Quality, who had not suffered, or been perplexed, by the Weight

(a) *Clar. Hist. Rebel.* 53. 54.

(b) As an Appeal, according to Lord *Holt*, is a noble Remedy, and a true Badge of the *English* Rights and Liberties. [*Lord Raym.* 557.] and is much indulged by the common Law in all Cases. [2 *Salk.* 511. *Lord Raym.* 15. *Skin.* 524. *Comb.* 276.] Therefore the creating a Judge a Peer of the Realm, seems an Infringement of this Liberty of the Subject, because the Party hath thereby the Judgment of the Person from whom he appeals, in the Court to which he appeals.

(c) *Clarend. Hist. Rebel.* 222. 223.

or Fear of those Censures and Judgments. For, having extended their Jurisdiction, from Riots, Perjury, and the most notorious Misdemeanors, to an asserting all Proclamations, and Orders of State; to the vindicating illegal Commissions, and Grants of Monopolies (all which were the chief ground Works of their late Proceedings): no Man could hope to be longer free from the Inquisition of this Court, than he resolved to submit to those, and the like extraordinary Courses. And therefore, there was an entire Inclination to limit and regulate the Proceedings of this Court, to which Purpose a Bill was brought in, and twice read, and, according to Custom, committed. It being returned after, by the Committee, and the Amendments read, it was suddenly suggested (by a Person not at all inclined to Confusion) that the Remedies provided by that Bill were not proportionable to the Diseases; that the Usurpations of this Court were not less in the Forms of their Proceedings, than in the Matter on which they proceeded; insomuch that the Course of the Court (which was the Rule of their judging) was so much corrupted, that the Grievance was as much thereby, in those Cases of which they had a proper Connusance, as it was by their Excess in holding Pleas of that, in which, in Truth, they had no Jurisdiction: and therefore he conceived, the proper and most natural Cure for this Mischief, would be, utterly to abolish this Court, which it was very difficult, if not impossible, to regulate; and in Place thereof, to erect and establish such a Jurisdiction as might be thought necessary. Hereupon the same Bill was re-committed, with Direction, so far to alter the Frame of it, as might serve utterly to take away, and abolish this Court: which was accordingly done; and again brought to the House, and engrossed, and sent up to the (a) Lords. So that important Bill was never read but once in the House of Commons, and was never committed; which his Lordship believes was never before heard of in Parliament.

This Passage from Lord *Clarendon* is cited by *anti-constitutional* Writers, as an Authority to weaken, if possible, the Force of the Act of Parliament for abolishing the Court of *Star-Chamber*, and for the Purpose of giving Strength to those Resolutions which these Authors adopt; in order effectually to oppose these and all such Attempts, I shall consider this Matter more at large.

(a) Lord *Clarendon* says, it could not meet with any Opposition in the House of Peers, all who had been Judges there, having their several Judgments hanging like Meteors over their Heads; and the rest, being either grieved, or frightened, by it. *Clarend. Hist. Rebel.* 223.

Whoever will beat the Trouble to read the Proceedings of the House of Commons, at this Time, as they stand in their Journal, for abolishing this Court, will be satisfied, I dare say, that they had under their Consideration the legal and assumed Jurisdiction of that Court, with its great and manifold Abuses, and that the House, by themselves and their various Committees, (one of which, without speaking of the rest, was composed, with other Persons, of Men whose consummate Learning and profound Knowledge of Law and Government, with other Abilities, have been seldom equalled in this or any other Kingdom) received the Petitions of the Parties aggrieved, gave proper Orders for their Discharge, and every thing requisite for the Support of their Petitions, considered the Certificates of their Imprisonment, with their Causes, heard the Petitioners in Person, or by Council, examined their Witnesses and Papers, and inspected the Records of the enormous Proceedings and Decrees of this Court, making the most diligent and strict Enquiry, into the Verity and Nature of all those Facts, which, upon full Consideration, were, with great Reason, held to be the proper Grounds of its Dissolution; and in their Proceeding by Bill to declare and regulate the Power of the *Star-Chamber* and Council-Table, and by another Bill to reform their unlawful Acts and Proceedings; and by a third, formed of them, which in its Progress was rendered effectual, for regulating the Privy Council, and taking away the Court of *Star-Chamber*, governing themselves with great Deliberation and Advise, and in proper Season conferring, from Time to Time with the Lords, whereby they united their Wisdom with their own; so that, notwithstanding Lord *Clarendon's* Representation, this Law was no precipitate Act of the State, or of the House of Commons in particular, but the Result of a patient Hearing of all proper Parties, a careful Examination, mature Consideration, and consequent Knowledge of all its subject Matters, and necessary to the Restoration of legal Liberty and equal Justice, the chief Ends of all good Government:

The Abolition of this Court, with the Reasons for it, will best appear from the Words of the Act (a) of Parliament, intituled, "An Act for the Regulation of the Privy Council, and for taking away the Court commonly called the *Star-Chamber*."

(a) Stat. 16 Car. c. 10. *Charles* hesitated before he gave his Assent to this Bill. But finding that he had gone too far to retreat, and that he possessed no Resource in Case of a Rupture, he at last fixed the royal Sanction to this excellent Bill. But to shew the Parliament, that he was sufficiently apprised of the Importance of his Grant, he observed to them, that this new Statute altered in a great Measure the fundamental Laws, ecclesiastical and civil, which many of his Predecessors had established. 5 *Hume* 280.

WHEREAS

WHEREAS (a) by the Great (b) Charter, many Times confirmed in Parliament, it is enacted, That no Freeman shall be taken or imprisoned, or disseised of his Freehold or Liberties, or free Customs, or be outlawed or exiled, or otherwise destroyed, and that the King will not pass upon him, or condemn him but by lawful Judgment of his Peers, or by the Law of the Land; AND by another (c) Statute, it is enacted, That no Man shall be attached by any Accusation, nor forejudged of Life or Limb, nor his Lands, Tenements, Goods nor Chattels seized into the King's Hands, against the Form of the Great Charter, and the Law of the Land; AND by another (d) Statute, it is accorded, assented, and established, That none shall be taken by Petition or Suggestion made to the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same Neighbourhood, where such Deeds be done in due Manner, or by Process made by Writ Original at the common Law, and that none be put out of his Franchise or Freehold, unless he be duly brought in to answer, and fore-judged of the same by the Course of the Law; and if any thing be done against the same, it shall be redressed and holden for none: AND by another (e) Statute, it is, amongst other Things, enacted, That no Man, of what Estate or Condition soever he be, shall be put out of his Lands or Tenements, nor taken, nor imprisoned, nor disinherited, without being brought in to answer by due Process of Law: AND by another (f) Statute it is enacted, That no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land; and if any thing be done to the contrary, it shall be void in Law, and holden for Error: AND by another (g) Statute, it is, amongst other Things, enacted, that all Pleas which shall be pleaded in any Courts before any of the King's Justices, or in his other Places, or before any of his other Ministers, or in the Courts and Places of any other Lords within the Realm, shall be entered and enrolled in *Latin*: AND WHEREAS by another (h) Statute, Power is given to the Chancellor, the Lord Treasurer of *England* for the

(a) Stat. 16 Car. c. 10. Sect. 1.

(b) Stat. 9 Hen. 3. c. 29.

(c) Stat. 5 Edw. 3. c. 9.

(d) Stat. 25 Edw. 3. St. 5. c. 4.

(e) Stat. 28 Edw. 3. c. 3.

(f) Stat. 42 Edw. 3. c. 3.

(g) Stat. 36 Edw. 3. c. 15.

(h) Stat. 3 Hen. 7. c. 1.

Time being, and the Keeper of the King's Privy Seal, or two of them, calling unto them a Bishop and a temporal Lord of the King's most honourable Council, and the two chief Justices of the *King's Bench* and *Common Pleas*, for the Time being, or other two Justices in their Absence, to proceed as in that Act is expressed, for the Punishment of some particular Offences therein mentioned: AND by another (a) Statute, the President of the Council is associated to join with the Lord Chancellor and other Judges in the said (b) Statute. BUT the said Judges have not kept themselves to the Points limited by the said Statute, but have undertaken to punish where no Law doth warrant, and to make Decrees for Things having no such Authority, and to inflict heavier Punishments than by any Law is warranted.

II. AND forasmuch as all Matters examinable or determinable before the said Judges, or in the Court commonly called the *Star-Chamber*, may have their proper Remedy and Redress, and their due Punishment and Correction by the common Law of the Land, and in the ordinary Course of Justice elsewhere. AND forasmuch as the Reasons and Motives inducing the Erection and Continuance of that Court do now cease; and the Proceedings, Censures and Decrees of that Court have, by Experience, been found to be an intolerable Burthen to the Subject, and the Means to introduce an arbitrary Power and Government; AND forasmuch as the Council-Table hath of late Times assumed unto itself a Power to intermeddle in civil Causes, and Matters only of private Interest, between Party and Party, and have adventured to determine of the Estates and Liberties of the Subject, contrary to the Law of the Land, and the Right and Privileges of the Subject, by which, great and manifold Mischiefs and Inconveniences have arisen and happened, and much Uncertainty by Means of such Proceedings, have been conceived concerning Men's Rights and Estates, for settling whereof, and preventing the like in Time to come.

III. The said Court, commonly called the *Star-Chamber*, and all Jurisdiction, Power and Authority belonging unto or exercised in the same Court, or by any the Judges, Officers or Ministers thereof, is clearly and absolutely dissolved, taken (c) away, and determined;

(a) Stat. 21 Hen. 8. c. 20.

(b) Stat. 3 Hen. 7. c. 1.

(c) Lord Clarendon says, thus fell this high Court, a great Branch of the Prerogative; that the taking it away was an Act very popular; which, it may be, was not then more politic, than the reviving it may be thought hereafter, when the present Distempers shall be expired. Clarend. Hist. Rebel. 223. INDEED!

and

and neither the Lord Chancellor, or Keeper of the Great Seal of *England*, the Lord Treasurer of *England*, the Keeper of the King's Privy Seal, or President of the Council, nor any Bishop, temporal Lord, Privy Counsellor or Judge, or Justice whatsoever, shall have any Power or Authority to hear, examine or determine any Matter or Thing whatsoever, in the said Court, commonly called the *Star-Chamber*, or to make, pronounce or deliver any Judgment, Sentence, Order or Decree, or to do any judicial or ministerial Act in the said Court: And all and every Act and Acts of Parliament, and all and every Article, Clause and Sentence in them, and every of them, by which any Jurisdiction, Power or Authority is given, limited or appointed unto the said Court, commonly called the *Star-Chamber*, or unto all, or any the Judges, Officers or Ministers thereof, or for any Proceedings to be had or made in the said Court, or for any Matter or Thing to be drawn into Question, examined or determined there, shall for so much as concerneth the said Court of *Star-Chamber*, and the Power and Authority thereby given unto it, be repealed and absolutely revoked and made void.

IV. No Court, Council or Place of Judicature shall be erected, ordained, constituted, or appointed within this Realm of *England*, or Dominion of *Wales*, which shall have, use or exercise the same, or the like Jurisdiction, as is, or hath been used, practised or exercised in the said Court of *Star-Chamber*.

An intelligent Friend informs me that the Records and Papers which belonged to this Court are not any where to be found, being destroyed, as he supposes, to prevent their proving to Posterity the Particulars of all those Grievances which those Judges imposed on their fellow Subjects, under Colour and in the Name of public Justice, founding their Decrees on their Passions, their arbitrary Wills, foreign Laws, *civil* or *canon*, or on any thing rather than the proper Principles of Law, Equity, or Humanity; and whose Cruelty seems to have wanted nothing to complete it, but the Power and Use of Torture, the usual Companion of the *civil* Law.

The Court of *Star-Chamber* with all its legal and assumed Jurisdiction, Power and Authority, being thus dissolved, taken away, and determined, by Reason that Decrees unwarranted by Law, and without Authority had been there made, and that the Proceedings, Censures and Decrees of the same were so extremely grievous and pernicious in their Nature and Effects, with an Inhibition to erect for the future any Court, which should have or exercise the same or like

like Jurisdiction, as had been therein exercised, the Polity framed by this Court for the Government of the Kingdom with respect to Libels was thereby annulled ; and all subsequent Attempts to enforce the Resolutions of this arbitrary Court thus abolished, as authoritative Rules or Laws still subsisting, are, in my Apprehension, utterly incompatible with this Statute, and the Rights and Liberties of the Kingdom.

All History proves that Liberty without its proper Security becomes the certain Victim of Power, its native Beauty and Excellence tempting the Ravisher not to preserve, but to seize and destroy it, and a little Consideration, I presume, will convince the intelligent Reader that in limited Monarchies to subject the Liberties of the People, and in particular the Liberty of the Press, wherein the rest are so nearly concerned, to the discretionary, that is, the arbitrary Decisions of a Court, composed wholly or chiefly of the Prince's Privy Council, is, in Effect, to prepare for their Diminution or Suppression, and in Time for their total Extirpation ; and such plainly was the Nature of the Decrees and Resolutions of this Court, whose Proceedings were conformable to the Order of the *civil* Law, rather than of the fundamental Laws of the Land ; and what *Buchanan* said of the Judges in his own Country, might well be said of the Judges of this Court, that *their Government was evidently tyrannical, their sole Decisions being Law.*

All Courts do in Course form such Rules, Decrees and Resolutions as are suitable to their own Nature ; wherefore the Resolutions of this arbitrary Court, even while it subsisted, could not, I conceive, upon the Principles of Law, be cited and urged as proper Precedents in the constitutional Courts of the Kingdom, for the Court of *Star-Chamber* being, for the Causes, and in the Manner aforesaid, utterly abolished, the Resolutions of the same thereby lost all future Force, or, in other Words, were thereby absolutely rescinded ; so that they could not *in futuro* be cited, urged and received as Law under any Denomination whatever, as appears to me most manifest. A deadly Fountain being covered up, and buried, its Streams can no longer pollute the Earth, nor a Tree plucked up by the Roots continue to bear its poisonous Fruit. Causes will ever produce their Effects, whether their Nature and Operations be in Season attended to or not ; and the Parliament having expressly declared that the Proceeding, Censures and Decrees of this Court had by Experience been found to be an intolerable Bur-
then

then to the Subject, and the Means to introduce an arbitrary Power and Government; upon the Adoption of these Proceedings for the Rule of our Government, can we with Reason avoid this Conclusion, that the same Causes will in Time produce the same Effects?

But although it be thus by Act of Parliament declared, that the Proceedings, Censures and Decrees of the Court of *Star-Chamber*, collectively considered, were so extremely burthensome to the Subjects, and destructive of their Liberties, whereupon the Foundation of their Authority was taken away; yet I have lately seen the Writings of some Authors, who without particularly considering the Intent, Force or Effect of this Statute, or the Nature of this Court, would establish their Resolutions respecting Libels, as good Authorities in Law, at this Day, though they scruple not to censure their Decrees in other Matters, seeming to proceed, as if they thought it was in their Power, to select the Resolutions of this Court, for Preservation or Condemnation at their Discretion.

I will now proceed to state some Passages from these Authors; one of them writes thus:

“The Court of *Star-Chamber* (a) has been held in great Contempt, because it was abolished by Act of Parliament, on Account of some insufferable Abuses that had crept into it, all the Cases that had been adjudged there, on Informations for Libels, were consequently of no Authority; whereas the Judgment given there, in Matters properly cognizable before them, which libelling especially was, are allowed to be good Law at this Day, and are constantly quoted as such, in the Court of *King's Bench*. Indeed it is said, that the Reason of disallowing the *Star-Chamber* Court was, because their Authority was before, and now is in *B. R.* and consequently that Court unnecessary (b). The Lord Chief Justice *Holt* declared, that *B. R.* possessed all the lawful Power of the *Star-Chamber* (c). And that the Court of *Star-Chamber* was taken away, because the Crimes were punishable in *B. R.* (d), which is likewise intimated by the Statute itself. Now, though he is as well satisfied, perhaps, with the taking away of the Court of *Star-Chamber*, considering the Occasions that had been given, as any body can possibly be, and should equally rejoice, he hopes, at the redressing any other public Grievance; yet he cannot condemn by the Lump, and argue, that because the Court

(a) Dig. Lib. 103.

(b) Comb. 36.

(c) Comb. 142. Sid. 168. pl. 29. 10 Mod. 187. 2 Hawk. P. C. 142. Chap. 22, Sect. 2.

(d) 5 Mod. 464.

did something amiss, therefore it did nothing right. At this Rate, every Court that had or has a Being, may be in Danger of the same Epithets."

Another (a) observes, "that though the Lawyer is often to distrust the Law contained in the *Star-Chamber* Cases, yet they may deserve his Perusal; for it does not follow, that, because it is a *Star-Chamber* Case, every Part of it may not be considered as Law even at this Day."

Notwithstanding these respectable Authorities, our Inquiry into the Nature, Proceedings, Punishments, and Abolition of the Court of *Star-Chamber* hath, we presume, clearly shewn that the Resolutions of that Court, which were intended to form, and have been supposed to contain a complete Body of Laws touching Libels, are void of all proper Authority, so that they cannot be enforced on the Subject, as Law in any Sense whatever; and I cannot forbear saying, that it hath ever appeared strange to me, that Lawyers bred up in the regular Study and Knowledge of the great and fundamental Laws of the Land, and in just Admiration of their Wisdom and Equity, and of those impartial and judicious Explications which, consonant to their Spirit and Intent, the Sages of the Law have made for the public Utility, in those Times wherein the Streams of Justice flowed free and pure, being unpolluted and unrestrained by the Hand of Power, should, through Inadvertence, acknowledge, or with Solicitude contend for, the Decisions given in the *Star-Chamber*, by a Collection of Courtiers, devoted to the Pleasure of Princes of arbitrary Dispositions, as good Authorities, and in Effect Laws, at this Day.

(a) Bar. Observ. on Stat. 347.

FINIS.

ERRATA.

Page. Line.

77. 13. for is read was.
14. for est read fuit.
15. for is read was.
20. for may read might.

Page. Line.

79. 23. for cannot read could not.
80. Note (c) for which read what.
Note (d) after 14 insert a Period.
85. 17. for concern read concerned.

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